Supreme Court, U.S.
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No. 01-

IN THE

Supreme Court of the United States

MICHAEL BLACKARD, SHARON BLACKARD,
AND ASHLEY BLACKARD,

Petitioners,

V.

MEMPHIS AREA MEDICAL CENTER FOR WOMEN, INC.
AND DR. FAZAL MANEJAWALA,

Respondents.

On Petition for Writ of Certiorari
To the United States Court of Appeals
For the Sixth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Does a subsequently overturned preliminary injunction enjoining enforcement of a state statute on constitutional grounds operate as a grant of blanket immunity for all persons who violate the state statute during the pendency of the injunction?

2. May non-parties to litigation be bound by a preliminary injunction when the parties to litigation have no control over the non-parties?

3. May the actions of a federal judge be attributed to a state, and make an admittedly constitutional state statute unconstitutional?

STATEMENT OF INTERESTED PARTIES

All parties to this case are named in the caption. No petitioner is a corporation requiring a statement as to publicly held ownership interests pursuant to Rule 29.6 of the Rules of this Court

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PETITION FOR WRIT OF CERTIORARI

Michael, Sharon and Ashley Blackard respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit in this case.

OPINIONS AND ORDERS BELOW

The opinion of the Court of Appeals is published at 262 F.3d 568. (App. 1a) The opinions of the District Court are unreported. (App. 22a, 31a)

JURISDICTION

The Court of Appeals entered its Judgment on August 24, 2001. (App. 1a) An order denying a timely petition for rehearing, and suggestion for rehearing en banc was entered on October 29, 2001. (App. 36a) The jurisdiction of this Court is invoked under 28 USC §1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Constitution, Amendment XIV, Section 1 provides:

> . . . No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Rule 65(d) of the Federal Rules of Civil Procedure provides:

> Every order granting an injunction and every restraining order . . . is binding only upon the parties to the action, their officers, agents, servants, employees, and attorneys, and upon those persons in active concert or participation with them who receive actual notice of the order by personal service or otherwise.

The following Tennessee constitutional and statutory provisions are reproduced fully in the Appendix:

Tenn. Const., Art. VI, §4 (App 39a)
Tenn. Code Ann. § 16-3-803 (App 40a)
Tenn. Code Ann. § 37-1-207 (App 45a)
Tenn. Code Ann. 37-10-301 - 37-10-307 (App 46a-51a)

STATEMENT OF THE CASE

On March 26, 1998 Ashley Blackard went to the Memphis Area Medical Center for Women (hereinafter "MCW") and obtained an abortion. At the time the abortion was performed upon Ashley, she was a 17 year old junior in high school, living at home with her parents Michael and Sharon Blackard. Ashley did not tell her parents she was pregnant and thus did not tell them about her plans to receive an abortion. Ashley received an abortion without consent of either parent, and without obtaining a court order to receive an abortion without parental consent.[1]

On November 12, 1998, plaintiffs Michael Blackard and Sharon Blackard, both individually, and as parents and legal guardians of their minor daughter, Ashley Blackard, filed their complaint against MCW, and Dr. John Doe, an unknown physician. Later the complaint was amended to add Ashley Blackard as a plaintiff in her own right, and Dr. Fazal Manejwala, the doctor who performed the abortion, was added as a defendant. The Blackards are all citizens of Mississippi, and Defendants are citizens of Tennessee. The diversity jurisdiction of the District Court was invoked pursuant to 28 USC §1332.

The complaint asserted a cause of action by the parents and the minor child due to the defendants' performing an abortion upon Ashley Blackard, without parental consent, in violation of the Tennessee Parental Consent for Abortion by Minors Act, Tenn. Code Ann. §37-10-301, et seq. (hereinafter "Parental Consent Act" or "Act") (App. 46a) and for common law battery. The Parental Consent Act prohibits a physician from providing a minor with an

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[1] These facts were stipulated in the joint pre-trial order.

abortion without written consent from one parent or a court order. The act defines a minor as a person under the age of eighteen (App. 47a). Violation of the Parental Consent Act not only incurs criminal penalties, but also provides civil remedies for the minor and her parents. See Tenn. Code Ann. §37-10-307. (App. 51a)

In their answers, MCW and Dr. Manejwala asserted that the Blackards' claims depended upon the viability of the Parental Consent Act, which they alleged was unconstitutional and preliminary enjoined by U.S. District Court Judge John Nixon of the Middle District of Tennessee in the case of *Planned Parenthood v. Sundquist*, 2 F. Supp.2d 997 (M.D. Tenn 1997). In that case, Judge Nixon issued a preliminary injunction which provided:

> It is Further ordered that, pending further order of this Court, defendants, their respective officers, agents, servants, employees, and attorneys and all other persons in active concert or participation with them, are hereby restrained from enforcing Tenn Code Ann §§ 37-10-301 through 37-10-307, the Parental Consent for Abortions by Minors Act. This amended order shall be effective nunc pro tunc August 26, 1997. (App 56A)

The named defendants to the *Planned Parenthood* suit who were enjoined by the District Court were (1) Donald Sundquist, Governor of Tennessee; (2) Knox Walkup, Tennessee Attorney General; and (3) Charles Ferrell, Administrative Director of the Courts (hereinafter "ADC").

While the Blackards' case was pending before the District Court, the United States Court of Appeals for the Sixth Circuit entered its decision in *Planned Parenthood of Memphis v. Don Sundquist*, 175 F.3d 456 (6th Cir. 1999). The Sixth Circuit held the Parental Consent Act is constitutional, and vacated the preliminary injunction.

On August 31, 1999, defendants filed a renewed motion seeking summary judgment or alternately for relief under F. R. Civ. P. 60(b)—summary judgment having been twice previously denied. In this third motion, defendants argued that even if the Parental Consent Act is on its face constitutional, the fact that Judge Nixon

issued a preliminary injunction precluded there being an operable judicial bypass in Tennessee. Since a Parental Consent Act must contain a judicial bypass provision to be constitutional, defendants argued the Parental Consent Act was thus rendered unconstitutional by the federal injunction.

In response the Blackards argued that since the injunction in the *Planned Parenthood* case only enjoined Mr. Charles Ferrell, the ADC, the injunction could not be binding upon the elected judges of Tennessee who were not named defendants in the suit, and therefore the preliminary injunction could not have prevented enforcement of the judicial bypass provision of the Parental Consent Act. The Blackards additionally argued that the actions of a federal judge could not be attributed to Tennessee, and because the Fourteenth Amendment requires state action for there to be a constitutional violation, it made no sense to say that the actions of a federal judge made a statute unconstitutional.

On November 19, 1999, the District Court entered it's "Order Granting Motion for Relief from a Prior Order" (App. 22a). In that order the District Court held that since the ADC was enjoined from enforcing the Parental Consent Act and the judges of Tennessee are in active concert with the ADC, the Courts of Tennessee were also enjoined from implementing the judicial bypass procedure. The Court then reasoned that the Parental Consent Act was rendered unconstitutional by the preliminary injunction because a Parental Consent Act must contain a judicial bypass in order to be constitutional. See *Bellotti v. Baird*, 443 U.S. 622, 643 (1979). The District Court then held the Blackards could not rely upon the Act at trial.

As a result of the aforestated order, Michael and Sharon Blackard were dismissed as plaintiffs since their cause of action was created by the Parental Consent Act. Ashley Blackard was not allowed to put on proof of the violation of the Parental Consent Act as *prima facie* evidence of battery. The jury was not instructed that violation of the Parental Consent Act was *prima facie* evidence of battery, and further was not instructed as to the interference with family relations cause of action created by the Act.

Only Ashley Blackard was allowed to proceed to trial on the common law battery claim, with the sole question being whether, as a 17 year old minor, she had the capacity to consent to an abortion. However, since Ashley Blackard could not use the Act, the jury was instructed in accordance with the common law rule that a minor over the age of fourteen is presumed capable of consenting to medical procedures. The jury entered a defense verdict on December 3, 1999. The District Court's order denying a motion for a new trial was entered on February 11, 2000 (App. 31a).

On appeal, a panel of the Sixth Circuit affirmed the judgment of the District Court. (App. 1a)[2] A timely petition for rehearing en banc was denied on October 29, 2001 (App. 36a).

REASONS FOR GRANTING THE WRIT

I. A PRELIMINARY INJUNCTION ISSUED BY A UNITED STATES DISTRICT COURT AGAINST CERTAIN STATE OFFICIALS, DUE TO THE ALLEGED UNCONSTITUTIONALITY OF A STATE STATUTE, DOES NOT GRANT BLANKET IMMUNITY TO ALL NON-PARTIES TO VIOLATE SAID STATUTE DURING THE PENDENCY OF THE PRELIMINARY INJUNCTION WITH IMPUNITY.

This case raises a critical issue concerning the effect of a preliminary injunction issued by a United States District Court purportedly enjoining enforcement of a state statute, when such preliminary injunction is later reversed by the United States Court of Appeals. Respondents contend that the preliminary injunction entered by Judge Nixon in the case of *Planned Parenthood of Memphis v. Sundquist*, (App 56a) prohibiting

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[2] Contrary to its own precedence, the panel applied a "clearly erroneous" standard of review to the district court's judgment. The Sixth Circuit had previously held the legal effect of a preliminary injunction upon non-parties is a question of law reviewed de novo. *United States v. Hochschild*, 977 F.2d 208, 211 (6th Cir. 1992).

enforcement of the Tennessee Parental Consent for Abortion by Minors Act gave blanket immunity for all physicians in Tennessee to perform abortions in violation of said statute with impunity during the pendency of the preliminary injunction, notwithstanding the fact that such preliminary injunction was reversed by the Sixth Circuit and the Parental Consent Act is in fact constitutional.

In effect, respondents assert that Judge Nixon's preliminary injunction essentially repealed the state statute during the pendency of the preliminary injunction, allowing all persons to violate the Act without fear of ever being held civilly liable for violation of the Act. The Blackards assert that a federal court does not have such broad power, and that any person who violates a duly enacted state statute, albeit preliminary enjoined, runs the risk that such injunction could be reversed in the future and the person could be held civilly liable.

This very issue was addressed by Justice Stevens's concurrence in *Edgar v. Mite Corp., et al.*, 457 U.S. 624, 647 (1982). In *Edgar v. Mite Corp.*, a corporation organized under Delaware law with a principal office in Connecticut initiated a cash tender offer for all outstanding shares of an Illinois corporation by filing a schedule with the Security and Exchange Commission in compliance with federal law. The corporation did not comply with an Illinois take over statute which required that a take over offer be registered with the Secretary of State of the State of Illinois, if an Illinois shareholder owned ten percent or more of the targeted company. Instead, the corporation filed an action in the United States District Court for the Northern District of Illinois, asking for declaratory judgment that the Illinois statute was preempted by the Williams Act, and arguing that the Illinois statute violated the commerce clause of the United States Constitution. (Art. I, § 8, Clause 3). Mite Corporation sought a temporary restraining order and preliminary injunction prohibiting the Illinois Secretary of State from enforcing the Illinois statute. The District Court issued a preliminary injunction prohibiting enforcement of the statute against the tender offer. The State of Illinois appealed issuance of the preliminary injunction, and the Supreme Court addressed the

issue of whether the issue was moot after the cash tender offer was withdrawn.

In analyzing these facts, Justice Stevens, elaborated in a concurring opinion:

> The question whether this case is moot depends on the effect of the preliminary injunction entered on February 2, 1979, restraining the Illinois Secretary of State from enforcing the Illinois Business Take Over Act while the injunction remained in effect. If, as Justice Marshall contends in his dissenting opinion, the injunction granted the Mite Corporation a complete immunity from state sanctions for any acts performed while the injunction was outstanding, I would agree that the case is moot. On the other hand, if the injunction did no more than it purported to do, setting aside the injunction would remove its protection and Mite would be subject to sanctions in the state courts. Those courts might regard the fact that an injunction was outstanding at the time Mite violated the Illinois statute as a defense to any enforcement proceeding, but unless the federal injunction was tantamount to a grant of immunity, there is no federal rule of law that would require the state Courts to absolve Mite of liability. I believe, therefore, that to resolve the mootness issue . . . which, of course, is jurisdictional, we must answer the question that Justice Marshall's dissent raises.

Edgar v. Mite, 457 U.S. at 647.

> [Justice Marshall's] proposed rule would treat any federal judge's preliminary injunction restraining enforcement of a state statute on federal grounds as a grant of immunity with respect to any conduct undertaken while the injunction was outstanding. Under the rule he proposes, "if the statute is later determined to be valid, the state will never be able to prosecute the individual that obtained the preliminary injunction for action taken while the injunction was in effect" . . . For me, the question is not whether such a rule

> would be wise; the question is whether federal judges possess the power to grant such immunity. In my opinion, they do not.

Edgar v. Mite, 457 U.S. at 647-648.

> Neither the terms of the preliminary injunction nor prior equity practice provides any support for an interpretation of the District Court's order as a grant of total immunity from future prosecution. More fundamentally, federal judges have no power to grant such blanket dispensation from the requirements of valid legislative enactments.

Edgar v. Mite, 457 U.S. at 648-649.

Justice Stevens' concurrence powerfully argues that District Courts do not have power to grant blanket immunity for people to violate a state statute. This limitation makes sense especially in light of the limited proof needed to obtain a preliminary injunction. Under Rule 65 of the Federal Rules of Civil Procedure, a preliminary injunction may be issued merely upon the showing of a probability of success on the merits. Thus, as a safeguard, Rule 65 requires applicants to post sufficient surety so that if the injunction is wrongfully issued, the person or entity wrongfully enjoined has a monetary remedy. (*See* Fed. R. Civ. P. 65(c)). *Edgar v. Mite* 457 US at 649. In this case *none* of the parties were parties to the *Planned Parenthood* suit, and no bond was posted to insure against wrongful issuance of a preliminary injunction. The Blackards had no notice of the *Planned Parenthood* suit, and thus were not protected from the wrongfully issued preliminary injunction.

Following Justice Steven's rationale, the issuance of Judge Nixon's injunction *at best* acted as a temporary bar to plaintiffs bringing a cause of action, but did not absolve the defendants of liability under the Act. Once the statute was found to be constitutional, the Blackards should have been able to maintain a cause of action under the Parental Consent Act. To hold otherwise would be to hold that a federal judge through issuance of a preliminary injunction

may grant blanket immunity to all persons to violate a duly enacted state statute. A District Court does not possess such broad powers.

The Sixth Circuit's attempt to distinguish *Edgar* fails to address the blanket immunity issue. First, the panel states that *Edgar* is distinguishable because in the case at bar, Defendants were relying on a previously issued and enforceable injunction. (App 19a) At issue in *Edgar*, however, was the power of a District Court—does the District Court, through issuing a preliminary injunction, have the *power* to repeal a state statute? If the court has no power to grant blanket immunity—people at large who choose to violate an act during the pendency of a preliminary injunction run the risk that they may later be held accountable for damages for violating the Act once an injunction is vacated.

Secondly, the Sixth Circuit distinguishes *Edgar* by opining that this is an abortion case, implying that the law is different when abortion is concerned:

> A second reason that the *Edgar* case is not analogous is that reliance upon a declaratory judgment action is not constitutionally sufficient recourse in the context of abortion. (App 20a)

Why does the fact that this case concerns abortion matter when delineating the effect of a District Court's preliminary injunction? Does the power of a federal judge in implementing a provisional remedy somehow change depending upon the subject matter of the constitutional violation, or do all the usual rules go out the window when the question of abortion is involved in litigation? As Justice Scalia is known to say "the rule of law is a law of rules." The legal limits of the effects of a preliminary injunction should not change dependent upon the subject matter of the lawsuit.

As the Sixth Circuit has recently held, the purpose of a preliminary injunction is merely to preserve the relative positions of the parties until a trial on the merits can be heard. *Six Clinics Holding Corporation v. Cafcomp Systems, Inc.*, 119 F.3d 393, 400 (6th Cir. 1997). Given this limited purpose, and given the haste that is often necessary if those positions are to be preserved, a preliminary

injunction is customarily granted on the basis of procedures that are less formal and evidence that is less complete then in a trial on the merits. *Id.* Thus, it makes little sense to say that a preliminary injunction, with its limited purpose, could have the effect of repealing a duly enacted state statute for persons not parties to the injunction suit. How can the Blackards forever lose a civil cause of action arising under an unquestionably constitutional statute due to an erroneous action of a federal judge, later reversed on appeal?

II. IT VIOLATES DUE PROCESS AND RULE 65(d) OF THE RULES OF CIVIL PROCEDURE FOR INDIVIDUALS WHO ARE NOT PARTIES TO LITIGATION TO BE CONSIDERED BOUND BY A PRELIMINARY INJUNCTION WHEN THE NAMED PARTIES HAVE NO AUTHORITY OR CONTROL OVER THE NON-PARTIES.

It is elementary that injunctive relief is an equitable remedy by which a Court orders a person to act or refrain from acting. Injunction is defined in Blacks law dictionary as:

> A prohibitive, equitable remedy issued or granted by a Court at the suit of a party complainant, directed to a party defendant in the action, or to a party made a defendant for that purpose, forbidding the latter to do some act, or to permit his servants or agents to do some act, which he is threatening or attempting to commit, or restraining him in the continuance thereof, such act being unjust and inequitable, injurious to the plaintiff, and not such as can be adequately addressed at law.

Blacks Law Dictionary, 705 (5th ed. 1979)

It is apparent from the very definition of "injunction" that an injunction is a Court order directed to a party before the Court. Courts do not enact legislation for members of the public at large – they frame decrees and judgments binding on parties before them. For that

reason, Courts of equity have long observed the general rule that a Court may not enter an injunction against a person who has not been made a party to the case before it.

For example, in *Chase National Bank v. City of Norwalk*, 291 U.S. 431 (1934), this Court found clearly erroneous an injunction that was directed at "all persons to whom notice of the order of injunction should come." Writing for a unanimous Court, Justice Brandeis explained that it was improper for the District Court to make punishable as a contempt the conduct of persons who act independently and whose rights have not been adjudged according to the law. *Chase*, 291 U.S. at 437. "Unless duly summoned to appear in a legal proceeding," he added, "a person not a privy [of a party] may rest assured that a judgment recovered therein will not affect his legal rights." *Chase*, 291 U.S. at 441. See also *Regal Knitwear Co. v. NLRB*, 324 U.S. 9, 13 (1945) (Courts may not grant an injunction so broad as to make punishable the conduct of persons who act independently and whose rights have not been adjusted according to the law.)

As Judge Learned Hand eloquently stated:

> [No] Court can make a decree which will bind any one but a party; a Court of equity is as much so limited as a Court of law; it cannot lawfully enjoin the world at large, no matter how broadly it words it decree. If it assumes to do so, the decree is *pro tanto brutum fulmen*, and the persons enjoined are free to ignore it. It is not vested with sovereign powers to declare conduct unlawful; its jurisdiction is limited to those over whom it gets personal service, and who therefore can have their day in Court.

Alemite Mfg. Corp. v. Staff, 42 F.2d 832 (2d Cir. 1930).

This limitation of a Court to bind by injunction parties, also, necessarily includes those over whom parties have control. Otherwise, an enjoined person could thwart the very purpose of injunctive relief by doing indirectly through agents that which he

or she could not do directly. Thus, this Court has held that an injunction binds not only parties to the suit, but those in privity with them:

> This [rule] is derived from the common law doctrine that a decree of injunction not only binds the parties defendant but also those identified with them in interest, in "privity" with them, represented by them or subject to their control. In essence it is that defendants may not nullify a decree by carrying out prohibited acts through aiders and abettors, although they were not parties to the original proceeding.

Regal Knitwear Co., 324 U.S. at 14.

To be in privity with an enjoined party connotes that the enjoined party has some type of authority or control over the non-named parties. This furthers the rationale that a person may not do indirectly through aiders and abettors that which he may not do directly. Such a limitation on the scope of injunctive relief, though grounded in due process, is also codified in Rule 65 (d) of the Federal Rules of Civil Procedure:

> Every order granting an injunction... is binding only upon the parties to the action, their officers, agents, servants, employees, and attorneys, and upon those persons in active concert or participation with them who receive actual notice of the order by personal service or otherwise.

F. R. Civ. P. 65(d)

One dispositive question before the lower Courts concerned the legal effect of the preliminary injunction issued by Judge Nixon in *Planned Parenthood* upon enforcement of the Parental Consent Act. Defendants argued that since the ADC was enjoined from enforcing the Parental Consent Act, the Courts of Tennessee were also enjoined. Defendants thus asserted there

was no judicial bypass procedure in place in Tennessee since such procedure was purportedly enjoined, and thus the Act was rendered unconstitutional under *Bellotti v. Baird*, 443 U.S. 622 (1979) (In order for parental consent statute to be constitutional, it must contain provision for a judicial bypass). Defendants then concluded that since the Act was unconstitutional due to the lack of a judicial bypass procedure, the Blackards could not utilize the civil remedy provisions of the Act.

The *Planned Parenthood* suit was not a class action suit, and only named the following defendants: (1) Donald Sundquist, Governor of the State of Tennessee; (2) Knox Walkup, Attorney General of the State of Tennessee; and (3) Charles Ferrell, Administrative Director of the Courts. The *Planned Parenthood* suit did not name the judges of the State of Tennessee as defendants, nor anyone with supervisory control over the judges.[3] The duties of the ADC, then Mr. Charles Ferrell, are purely administrative in nature, and are elaborated in T.C.A. § 16-3-803. (App. 40a). None of the duties of the ADC provided Mr. Ferrell with any type of control over the judges of the State of Tennessee.[4]

The District Court held that the Courts of Tennessee were bound by Judge Nixon's injunction against Mr. Charles Ferrell, the ADC, because they were in privity with him despite the ADC's lack of authority to control the judges in Tennessee (App. 29a). The Court reasoned that the following statutory duties of the ADC established privity between Mr. Ferrell and the Courts of Tennessee:

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[3] The judges of the State of Tennessee are elected by the voters of each county, and thus are not under the control of the Governor, Attorney General or Administrative Director of the Courts. (*See* Tenn. Const. art. VI, § 4 (App. 39a); *see also* T.C.A. § 37-1-207 (election of inferior judges) (App. 45a).

[4] *See* affidavit of current ADC, Ms. Cornella Clark ¶ 4 (App 52a). *See also* declaration of Judge Ken Turner ¶ 3 (App. 54a).

- The Administrative Director has the duty to assist the Chief Justice of the Supreme Court of Tennessee in the administration of the state Court system. (T.C.A. § 16-3-803(a)) (App. 29a).

- The Director acts as secretary to the Judicial Council of the State of Tennessee. (T.C.A. § 16-3-803(b)) (App. 29a).

- The Director has statutory duties to "establish criteria, develop procedures, and implement a statewide Court system and case management information system. (T.C.A. § 16-3-803(h)) (App. 29a).

- The Director annually collects, compiles, analyzes and publishes caseload statistics pertaining to the state Court system. (T.C.A. § 16-3-803(i)) (App. 29a).

- The Director is charged with conducting an ongoing internal review, analysis, and planning for the future of the state Court system in order to devise ways of simplifying Court system procedure, expediting the transaction of Court system business, and correcting weaknesses in the administration of justice. (T.C.A. § 16-3-803(k)) (App. 29a).

On appeal, the Sixth Circuit agreed with the District Court's holding that an injunction may bind a non-party, even if enjoined named parties do not control the non parties:

> In the instant case, despite the fact that the ADC may not have supervisory authority or control over the juvenile court judges, the ADC is identified in interest and acts in concert or participation with the state court system including the juvenile court judges. We therefore reject Plaintiffs' argument and conclude that the consent provision of the Parental Consent Act could not be enforced constitutionally where the juvenile court judges were enjoined from enforcing the judicial bypass procedure of the Act. (App 13a)

The Sixth Circuit cited *Regal Knitwear* in support of its finding of privity, but totally missed the rationale of the privity doctrine articulated therein. Although *Regal Knitwear* stands for the proposition that an enjoined person cannot thwart an injunction by carrying out enjoined acts through others, *Regal Knitwear Co.*, 324 U.S. at 14, a judge does not thwart an injunction when he enforces a statute despite an injunction against the administrator for the courts.

The ADC is a *servant* of the Courts in much the same way that a clerk is the servant of a judge. If the judges had been named parties to an injunction, they could not have their clerks or other agents violate the injunction under their direction. However, the converse is not true. An injunction against a judicial clerk or secretary could not bind the judge. The clerk *cannot control* the judge whereas the judge *can control* and does control the clerk. In the same way, the ADC cannot control the elected judges of the State of Tennessee, even though the elected Supreme Court of Tennessee can control the ADC.

Under the Sixth Circuit's rationale, public officials' personal secretaries could be named sole defendants in injunctive relief suits, and bind their employers. After all, a secretary's duties are to assist his or her employer, and find ways to more efficiently administer his or her supervisor's business, which is exactly the rationale the Sixth Circuit found to establish privity between the Courts of Tennessee and the ADC. Such clearly is not the law. The Sixth Circuit's ruling transforms privity into a principal making it is possible to bind the real decision maker soley by naming a subordinate as a party defendant.

Such a holding does not concord with purpose of privity doctrine, namely to prevent enjoined persons from doing indirectly through agents and subordinates that which they cannot do directly. Though it makes sense to say that an enjoined master may not order the servant to do that which the master may not, it makes no sense to say that an enjoined servant could bind the master whom he or she does not control. The Sixth Circuit's interpretation of privity and Rule 65(d) therefore violates due process, since it binds persons who are not parties before the Court.

A. The District Court analyzed the effect of the planned parenthood preliminary injunction upon enforcement of the parental consent act as a question of law, not of fact.

In addition to affirming the District Court's ruling that as a matter of law the *Planned Parenthood* injunction blocked enforcement of the Parental Consent Act, the panel in its opinion erroneously asserts that the District Court made a finding of fact that there was no judicial bypass available to Ashley Blackard. This conclusion of the panel is erroneous for several reasons.

First, the requirement for a Parental Consent Statute to contain a judicial bypass provision is a question determined as a matter of law, not as a question of fact. A judicial bypass is a statutory right for a minor to approach a court to obtain an abortion without parental consent. The requirement that parental consent laws contain judicial bypass provisions comes from this court's holding in *Bellotti v. Baird* that "statutes which do not contain an alternative or a judicial bypass procedure or statutes which contain a judicial bypass procedure which unduly burdens the right of a minor to obtain an abortion are unconstitutional." *Bellotti* 443 U.S. at 639-644. Whether a parental consent statute contains such a provision is a question of law. If one examines the Tennessee Parental Consent statute, it entitles a minor to approach a court and seek judicial permission for an abortion without parental consent. *See* Tenn. Code Ann. §37-10-303(b) (App 47a).

At the time of Ashley Blackard's abortion, a minor had a legal statutory right , to obtain a judicial bypass - since it was contained in the statute. It makes no sense to enquire as a matter of fact whether a judicial bypass is available, since a bypass is a legal right, not a fact. By analogy, the question of whether a minor has the right to seek permission from a court to marry without parental consent is a question of law. The answer to such a question would be derived from an analysis of the case law and statutory law. One would not obtain affidavits from Judges as to their opinion upon the availability of a judicial bypass for a minor to marry without parental consent. Rather, one would look at the substantive law. In the same way, whether a

minor had the ability to obtain relief from a court and have an abortion without parental consent, is similarly a question of law.

It is evident that the District Court analyzed the issue of availability of a judicial bypass as a question of law. That is precisely why the District Court found it necessary to determine what effect Judge Nixon's injunction had upon enforcement of the judicial bypass of the Parental Consent Act. If the injunction had the effect of *as a matter of law* enjoining enforcement of judicial bypass provisions of the Parental Consent Act, then, the District Court concluded, the Blackards could not utilize the act because, as a matter of law, no right to approach a court for a bypass would have been available. The panel of the Sixth Circuit agrees that such is the analysis of the District Court: "The District Court granted Defendant's motion for relief from a prior order after concluding that, based upon the expanded record, the scope of the *Memphis Planned Parenthood* Injunction included the Tennessee Juvenile Courts." (App. 7a).

If the question of whether there was a judicial bypass in place was a question of fact, then an analysis as to the legal effect of the *Planned Parenthood* injunction would be irrelevant. Yet, even the Sixth Circuit concedes that "[t]he status of the judicial bypass procedure, i.e. whether it was enforceable, at the time of Ashley Blackard's abortion, turns on the scope of the Memphis Planned Parenthood injunction." (App. 8a). If the enforceability of the Parental Consent Act depends on the scope of the *Memphis Planned Parenthood* injunction, then it is clear that the question is one of *law*, not fact.

The panel's erroneous conclusion that the District Court made findings of fact about the lack of judicial bypass is premised upon two affidavits filed by defendants in the District Court; one of C.R. Martin, clerk of Juvenile Court of Memphis, and one of Andrew Shookhoof, former Juvenile Judge in Nashville.[5] Because neither of these affidavits state facts, but only state each affiant's respective opinions as to the legal effect of Nixon's injunction upon the avail-

[5] The panel opinion refers to other affidavits as to the availability of a judicial bypass, affidavits contain rank hearsay. Since these affidavits were never mentioned by the district court, and since they are obvious hearsay, they could not have affected the district court's opinion.

ability of a judicial bypass for a minor, the District Court did not rely upon them to make factual findings in its order granting relief.

The affidavit of Mr. Martin contains his opinion that if a judicial bypass petition had been presented to the Juvenile Court by a minor during the pendency of the *Planned Parenthood* injunction, he as clerk would have filed the petition, but a juvenile judge would not have acted on it. The Blackards responded by moving to strike this conclusory affidavit. The District Court then entered an order requesting supplemental briefing on the issue of whether the courts of the State of Tennessee were in active concert or participation with Charles Ferrell, the ADC, who was a named party in the *Planned Parenthood* suit.[6]

The Court in its order discounted the affidavit of C.R. Martin, as not being based on personal knowledge:

> the court agrees with plaintiff's argument that Martin's testimony as to how the Juvenile Court would have acted upon Rule 24 bypass petition is not based upon personal knowledge. Martin may testify as to how he personally would have responded to such a petition, but he is in no position to testify as to how the Juvenile Court would have responded.

(R 94, J.A. at 476).

The affidavit of Andrew Shookhoff was filed by defendants after the Blackard's had already responded to the third motion for summary judgment, and after the court had already issued its order directing supplemental briefing towards the privity issue. The Shookhoff affidavit did not address the privity issue, and merely

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[6] In response to the order from the district court requesting briefing as to whether the Courts of Tennessee are in active concert with the ADC, plaintiffs submitted the affidavits of Cornelia Clark, the current ADC (App 52a), and Ken Turner, the Memphis, Shelby County, Juvenile Court Judge (App 54a). These affidavits were directed to the question the court specifically asked to be briefed; namely whether the Judges of Tennessee are in active concert and participation with the Administrative Director of the Courts.

stated that it was Shookhoff's opinion that the *Planned Parenthood* injunction prevented enforcement of the judicial bypass.

> When these injunctions were in effect against the Act, it was my understanding that the juvenile court did not have the legal authority to hear a minor's petition for judicial waiver of the parental consent requirement.

(Affidavit of Shookhoff) (R100, J.A. at 536)

Again, this affidavit states no more than one judge's legal opinion as to whether the Nixon injunction blocked the legal availability of a minor to approach a court and seek a judicial bypass. It does not state facts that are subject to independent verification - rather it states an opinion as to the status of the law.

On November 19, 1999 the District Court entered an order granting relief from a prior order pursuant to Rule 60(b) (App. 22a). The court in its order held that the threshold issue "is whether Judge Nixon's order was broad enough in scope to enjoin Tennessee state courts from implementing the statutory bypass procedure." (App 23a). The court then conducted a legal analysis of whether the ADC, a named defendant in the *Planned Parenthood* suit was in privity with the judges of the State of Tennessee. The analysis of whether the judges were in privity with the ADC centered upon review of the statutory duties of the ADC (App 29a).

The District Court's order granting relief does not even mention the affidavit of C.R. Martin, and it is thus clear it was not relied upon by the District Court. The District Court only fleetingly mentions the affidavit of former Juvenile Judge Andrew Shookhoff, solely with respect to Judge Shookhoff's opinion as to whether the *Planned Parenthood* injunction had the legal effect of barring Juvenile Courts from entertaining judicial bypass petitions. (App. 29a).

The panel thus erroneously concluded that the plaintiffs never contested the Martin and Shookhoff affidavits; and further erroneously concluded that the affidavits demonstrate that as a matter

of fact there was no judicial bypass in effect in Tennessee at the time of Ashley Blackard's abortion. (App 13a-14a). Ironically, the panel's finding would in effect gainsay the previous holding of the Sixth Circuit that the judicial bypass provisions in the Tennessee Parental Consent Act were in fact constitutional. *See Planned Parenthood v. Sundquist,* 175 F.3d 456 (6th Cir. 1998).

Moreover, legally plaintiffs were not required to respond more than they did. The Blackards had previously responded to two motions for summary judgment. With the third motion, defendants had submitted the affidavit of C.R. Martin, which the Blackards moved to strike. The affidavit of Shookhoff was filed late by defendants - after the Blackards had already filed their response to the third summary judgment motion. Under the local rule for the Western District, the Blackards were are only entitled to file one response to a motion for summary judgment, and thus could not have responded to the affidavit. (See W. D. Tenn. Local Rule 7.2(a)(2)).

Its also important to note that the District Court could not have made findings of fact, since affidavits are not evidence. To make findings of fact based upon uncross-examined affidavits would be error. Where facts are in dispute the court must conduct a hearing to resolve factual disputes. The court conducted no hearing, and thus was clearly relying on a legal analysis in entering its order granting relief under Rule 60(b). The panel thus erred when it found that the District Court made findings based upon affidavits, and further erred when it opined that plaintiffs were at fault for failing to refute the affidavits.

III. THE ACTIONS OF A FEDERAL JUDGE MAY NOT BE ATTRIBUTED TO A STATE, AND MAKE A STATE STATUTE UNCONSTITUTIONAL WHICH IS ADMITTEDLY CONSTITUTIONAL ON ITS FACE.

The Fourteenth Amendment to the Constitution provides in part that "[n]o state shall . . . deprive any person of life, liberty, or property without due process of law." Since the Supreme Court's decision in The Civil Rights Cases, 109 U.S. 3 (1883), "the principle has become firmly

embedded in our constitutional law that the action inhibited by the first section of the Fourteenth Amendment is only such action as may fairly be said to be that of the States." *Shelley v. Kraemer,* 334 U.S. 1 (1948).

In *Lugar v. Edmondson Oil Co.*, 457 U.S. 922 (1982), this Court discussed in detail the state action requirement for challenging an action as unconstitutional:

> As a matter of substantive constitutional law, the state action requirement reflects judicial recognition of the fact that "most rights secured by the constitution are protected only against infringement by governments"
>
> ...
>
> Careful adherence to the state action requirement preserves an area of individual freedom by limiting the reach of federal law and federal judicial power. It also avoids imposing on the state, its agencies or officials, responsibility for conduct for which they cannot be fairly blamed.
>
> *Lugar*, 457 U.S. at 936
>
> Our cases have accordingly insisted that the conduct allegedly causing the deprivation of a federal right be fairly attributable to the state.
>
> *Lugar*, 457 U.S. at 937[7]

In *Lugar*, this Court set forth a two part test to determine if deprivation of a federal right may be fairly attributable to the state. "First, the deprivation must be caused by the exercise of some right or privilege created by the state, or by a person for whom the state is responsible...Second, the party charged with the deprivation must be a person who may fairly be said to be a state actor...[either] because he is a state official, [or] because he has acted together with or has obtained significant aid from state officials, or because his conduct is otherwise chargeable to the state." *Lugar*, 457 U.S. at 937.

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[7] See also *National Collegiate Athletic Assn. v. Tarkanian*, 488 U.S. 179, 191 (1988); *Blum v. Yaretsky*, 457 U.S. 991, 1004 (1982).

In this case, it is undisputed that Tennessee enacted a constitutional Parental Consent Act. In *Planned Parenthood v. Sundquist*, 175 F3d 456 (6th Cir. 1999), the Sixth Circuit held that both the Parental Consent Act and the Tennessee Supreme Court Rule implementing the judicial bypass proceeding as provided in the statute, were in fact constitutional. Thus, everything done by Tennessee officials regarding the composition and implementation of Parental Consent Act satisfied due process.

The District Court's rationale for refusing to allow the Blackards to rely upon the Parental Consent Statute was the fact that the preliminary injunction issued by U.S. District Judge John Nixon blocked enforcement of the judicial bypass procedure and rendered the Parental Consent Act unconstitutional:

> It is clear to the Court, from the record now presented, that Judge Nixon's injunction effectively blocked enforcement of the judicial bypass procedure contemplated by the consent act, and that no such judicial bypass procedure existed at the time of Ashley Blackard's abortion. For this reason, the defendants cannot be charged with violating §37-10-307 for failing to comply with Tennessee's abortion judicial bypass procedure.

(App. 29a-30a).

Note that the District Court did not hold that the Parental Consent Act was unconstitutional on its face. Rather, the District Court held that U.S. District Judge John Nixon's actions rendered the statute unconstitutional. Following the *Lugar* analysis, Judge Nixon is not a person for whom the State of Tennessee is responsible – he is not a state official, and his conduct is not chargeable to the State of Tennessee. Thus there is no state action with respect to this claim, and the Tennessee statute can not be challenged as violative of substantive due process under the Fourteenth Amendment due to the actions of a U.S. District Judge. The lower Court's act of declaring a duly enacted statute unconstitutional *solely* because of the erroneous actions of a fed-

eral judge offends federalism and comity, and violates the very foundation of Fourteenth Amendment jurisprudence – the requirement of state action. A federal judge can not make a state statute unconstitutional.

On appeal, the Sixth Circuit erroneously held that the state action requirement was satisfied by either federal or state action:

> The premise underlying Plaintiffs' argument is also erroneous. The requirement that there be state action in the context of constitutional violations refers to government action - state or federal - as opposed to private action. (App 18a)

The Court missed the whole point. The very reason for the enactment of the Fourteenth Amendment after the Civil War was to limit the power of the states.[8] It makes no legal sense to hold that although Tennessee did everything right, a Tennessee law can violate the Fourteenth Amendment due to the actions of a federal judge who Tennessee cannot control.

The Sixth Circuit also erroneously concluded that if plaintiffs were correct "a federal District Court could never exercise jurisdiction to enjoin enforcement of a state law even if it determines the law is unconstitutional." (App 18a). Of course, a federal court has jurisdiction to enjoin unconstitutional acts of a state actor (42 U.S.C. § 1983, 28 U.S.C. §§ 1331, 1343(3)). But that is not what happened here. In this case, the Sixth Circuit held that a federal judge's actions in issuing a preliminary injunction made a state statute unconstitutional. That is wholly different than a judge *declaring* the acts of a *state* to be unconstitutional.

The panel's broad brush definition of state action may not be historically reconciled with the Fourteenth Amendment, and frustrates Tennessee's right as a sovereign to protect its minors from rash decisions of great magnitude. The sovereign state of Tennessee

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[8] C.f *Holmes v. Johnson*, 39 U.S. 540 (1840) (pre-Fourteenth Amendment case holding that 5th Amendment due process clause is not binding upon the states).

enacted a constitutional law, and a federal official cannot render such law violative of the Fourteenth Amendment.

IV. THIS CASE MERITS REVIEW BY THE SUPREME COURT

A. This Case Presents Important Jurisdictional and Procedural Issues.

The Supreme Court is primarily responsible for ensuring proper functioning of the judiciary. *McNabb v. United States*, 318 US 332 (1943). In light of this responsibility the court has often granted certiorari in cases involving federal jurisdiction, practice and procedure. Thus this Court has granted certiorari in cases involving jurisdiction of federal District Courts (*Bruner v. United States*, 343 US 1 (1952)); the scope and applicability of the forum non conveniens doctrine (*Gulf Oil Corporation v. Gilbert*, 330 US 501 (1947)); the scope of federal contempt powers (*Sacher v. United States* 343 US 112 (1952)); and the construction of the federal rules of civil procedure (*Hickman v. Taylor*, 329 US 495 (1947)). In light of these and many other cases, Supreme Court Rule 10(c) recognizes that the Supreme Court grants certiorari when the United States Court of Appeals has decided an important question of federal law that has not been but should be decided by the Supreme Court.

This case raises precisely the type of jurisdictional and procedural issues that should be decided by this Court. Does a preliminary injunction in effect repeal a duly enacted state statute, so that even if it is later determined that the preliminary injunction was wrongfully issued, all plaintiffs lose the benefit of a cause of action provided by the statute? Does a preliminary injunction issued pursuant to Rule 65 bind non-parties, who are not under the control of named enjoined parties? These questions as to the sweeping effect of federal preliminary injunctions, and how permanent are their effects, are important questions of federal jurisdictional and procedural law that should be decided by this Court.

B. This Case Presents Important Constitutional Issues.

The Sixth Circuit in effect held that the actions of a federal judge may cause an otherwise admittedly constitutional state statute to be unconstitutional. Such a result makes no sense in light of this Court's requirement that state action is necessary in order for there to be a constitutional violation. This court has granted certiorari in cases in conflict with this Court's constitutional jurisprudence. See *Edwards v. South Carolina*, 372 US 229, 230 (1963) (certiorari granted "to consider the claim that these convictions cannot be squared with the Fourteenth Amendment of the United States Constitution."); *Pointer v. Texas*, 380 US 400, 401 (1965)(certiorari granted to consider novel and important question whether the confrontation clause of the Sixth Amendment is applicable to the states). Certiorari is often granted when the Court of Appeals has misconstrued, misapplied or misconceived an applicable Supreme Court opinion, e.g., *McCandless v. Furland*, 296 US 140 (1935); and *Upshaw v. United States*, 335 US 410 (1948), or where the decision below "seemed to be out of line with the authorities," see, e.g., (*Braen v. Pfeifer Oil Transportation Co.*, 361 US 129, 130 (1959).

This Court has held as a matter of due process that an injunction may only bind parties to the suit and those in privity with them. See *Regal Knitwear Co.*, 324 US at 14. In defining privity, this Court stated that "in essence it is the defendants may not nullify a decree by carrying out prohibited acts through aiders and abedders, although they were not parties to the original proceeding". In the Blackard's case, the Sixth Circuit applied the privity doctrine to bind persons to a preliminary injunction who were not named parties to the injunction suit when the named parties had absolutely no control over the non-named parties. This holding is in conflict with this Court's opinion in *Regal Knitwear*, 324 U.S. 9 (1945).

Additionally, this Court held in *Lugar v. Edmondson Oil Company*, 457 US 922 (1982) that action by the state or one of its officers was required in order to challenge an action as unconstitu-

tional. The Sixth Circuit's opinion in this case effectively ignores that requirement, allowing a constitutional state statute to be made unconstitutional by the actions of a federal district court judge. Such a view of state action is in direct conflict with the holding in *Lugar v. Edmondson Oil Company*, 457 US 922 (1982).

C. The Holding of the Sixth Circuit is in Conflict with Decisions of Other Courts of Appeals.

Finally, the courts are in disarray as to the unresolved question posed by Justice Stevens in *Edger v. Mite*; does a preliminary injunction grant blanket immunity to all persons to violate a statute, even if the injunction is later vacated on appeal? As the District Court of Pennsylvania recently stated: "it is unclear whether a federal court has the power to enjoin prosecution under a statute for acts that occur during the pendency of injunctive relief if the statute is later reversed on appeal." *ACLU v. Reno*, 31 F. Supp. 2d 473, 499 n.1 (E.D. Pa 1999); aff'd on other grounds, 217 F.3d 162 (3rd Cir. 2000), certiorari granted on other grounds. *Ashcroft v. ACLU* __ U.S. __ , 149 L. Ed. 2d 1001.

Other courts have interpreted *Edgar* as holding federal courts do not have such broad powers:

> The question of whether the District Court abused its discretion in granting the preliminary injunction is still ripe. If this court were to determine that the District Court erred in issuing the preliminary injunction, then the legal interests and positions of Plaintiffs and interveners would be compromised as they have received no assurances that grievances will not be pursued and penalties not imposed under the old canon. *See Edgar v. Mite*...

Suster v. Marshall, 149 F.3d 523, 527 (6th Cir. 1998).

In *YWCA v. Kugler*, 463 F 2d 203 (3rd Circuit 1972), the Third Circuit acknowledged that if a declaratory judgment was reversed

on appeal, those who violated a duly enacted state statute did so at their peril, risking prosecution by the state:

> In the absence of a class action determination, the declaratory judgment is binding only between the seven individual physician plaintiffs and the defendant appellant. . . . The state remains free to take whatever steps against others than the individual plaintiffs it deems appropriate to enforce the statute by criminal sanctions . . . It seems likely that the state will not attempt to prosecute the individual plaintiffs for violation of the statute committed by them while the District Court judgment remains in effect, but it is clear that if they violate the statute during the pendency of the appeal from the judgment, they will be acting at their peril. If the judgment should be reversed, they may be prosecuted for such violations in the future.

YWCA v. Kugler, 463 F.2d at 204.

To the contrary, some pre-*Edgar* decisions support the proposition that a preliminary injunction acts as a grant of blanket immunity. *See U.S. v. Mancuso*, 139 F.2d 90 (3rd Cir. 1943) (Draft dodger who did not report for duty because of erroneously issued injunction could not be prosecuted).

The split of authority in the circuits and lack of clarity of the law warrants a grant of certiorari by this Court.

CONCLUSION

For the reasons stated herein, a writ of certiorari should be granted.

Respectfully submitted,

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Appendix A
Blackard v. M.A.M.C.W., 262 F.3d 568 (6th Cir. 2001)

ELECTRIC CITATION: 2001 FED App. 0286P (6th Cir.)
File Name: 01a0286p.06

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

MICHAEL BLACKARD and SHARON BLACKARD, both individually and as parents, legal guardians and next friends for ASHLEY BLACKARD, a minor,

Plaintiffs-Appellants,

v.

MEMPHIS AREA MEDICAL CENTER FOR WOMEN, INC.; FAZEL MANEJWALA, M.D.,

Defendants-Appellees.

No. 00-5326

June 8, 2001, Argued
August 24, 2001, Decided and Filed

Appeal from the United States District Court
for the Western District of Tennessee at Memphis.
No. 98-02996–Jon Phipps McCalla, District Judge.

BEFORE: KENNEDY, SILER, and CLAY, Circuit Judges.

COUNSEL

ARGUED: Robert L. Hutton, GLANKLER BROWN, Memphis, Tennessee, for Appellants. James L. Kirby, HARRIS, SHELTON, DUNLAP, COBB & RYDER, Memphis, Tennessee, Vickie H. Jones, BLACK & McLAREN, Memphis, Tennessee, for Appellees. Julie E. Sternberg, AMERICAN CIVIL LIBERTIES UNION FOUNDATION, New York, New York, for Amici Curiae.

ON BRIEF: Robert L. Hutton, GLANKLER BROWN, Memphis, Tennessee, for Appellants. James L. Kirby, HARRIS, SHELTON, DUNLAP, COBB & RYDER, Memphis, Tennessee, Vickie H. Jones, Michael G. McLaren, BLACK & McLAREN, Memphis, Tennessee, for Appellees. Jennifer Dalven, Louise Melling, AMERICAN CIVIL LIBERTIES UNION FOUNDATION, New York, New York, for Amici Curiae.

OPINION:

CLAY, Circuit Judge. Plaintiffs, Michael, Sharon and Ashley Blackard, filed the instant action in the United States District Court for the Western District of Tennessee alleging that Defendants, Memphis Area Medical Center for Women, Inc. ("MCW") and Fazel Manejwala, M.D., violated the Tennessee Parental Consent for Abortion by Minors Act (the "Act" or the "Parental Consent Act"), Tennessee Code Annotated §§ 37-10-301 to -307 (1996). Plaintiffs claim that Defendants performed an abortion on Ashley Blackard, who was then a seventeen-year-old minor, without the consent of her parents, Michael and Sharon Blackard, and assert a battery claim, based on the alleged violation of the Act and common law. Plaintiffs Michael and Sharon Blackard also asserted a claim for interference with family relations based on the Act.

On November 19, 1999, the district court entered an order granting Defendants' motion for relief from a prior order denying their respective motions to dismiss ("motion for relief from a prior order"). The district court's November 19, 1999 order held that Plaintiffs could not rely on the Parental Consent Act as a basis for their claims because its enforcement was enjoined at the time that Ashley Blackard obtained her abortion. Although Ashley Blackard's common law battery claim was permitted to go forward, Michael

and Sharon Blackard's claims were dismissed. Plaintiffs now appeal from the final judgment arguing that the district court's order granting Defendants' motion for relief from a prior order was erroneous. For the reasons that follow, we **AFFIRM** the district court's November 19, 1999 order and thus the final judgment.

BACKGROUND

On March 26, 1998, Ashley Blackard, who was seventeen years old at the time, traveled with her boyfriend to MCW to obtain an abortion, which was performed by Defendant Manejwala. Ashley Blackard consented to the abortion procedure, but neither she, Defendant Manejwala, nor Defendant MCW obtained consent for the abortion from Ashley's parents, Michael and Sharon Blackard.[1] In fact, Plaintiffs Michael and Sharon Blackard were unaware that their daughter was pregnant. When they learned of their daughter's abortion approximately six months later, after Ashley Blackard became pregnant again and dropped out of school, Plaintiffs Michael and Sharon Blackard filed a suit on their own and on Ashley's behalf.[2]

In their diversity action, Plaintiffs alleged that Defendants violated the Parental Consent Act when Defendant Manejwala performed an abortion on Ashley Blackard without her parents' consent. Plaintiffs alleged that a violation of the Act provided Michael and Sharon Blackard with a cause of action for tortious interference with family relations. Plaintiffs also claimed that Defendants committed common law battery and that a violation of the Act constituted *prima facie* evidence of the battery.

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[1] Prior to signing two informed consent forms, Ashley Blackard was informed of the risks and benefits associated with her pregnancy and the abortion. She also viewed a videotape explaining the abortion procedure and discussed the abortion procedure with her counselor.

[2] When Ashley Blackard obtained the age of majority, she was added as a plaintiff in her own right. In addition, Plaintiffs amended the complaint to add Defendant Manejwala, whose identity Plaintiffs were not aware of when the suit was initially filed, as a named defendant.

The Parental Consent Act, upon which Plaintiffs rely, requires that an abortion facility or physician obtain the written consent of the parent or legal guardian of a minor prior to performing an abortion on that minor. Tenn. Code Ann. § 37-10-303(a). The Act provided that in cases where the minor did not wish to seek the consent of the parent or legal guardian, the minor could petition the juvenile court for waiver of the consent requirement. Tenn. Code Ann. § 37-10-303(b). A violation of the Act is a misdemeanor and *prima facie* evidence of failure to obtain informed consent and of interference with family relations in appropriate civil actions. Tenn. Code. Ann. §§ 37-10-306 to -307.

At the time that Ashley Blackard obtained her abortion, however, there was an injunction in place enjoining the enforcement of the Parental Consent Act, particularly the judicial bypass procedure. The injunction resulted from an action filed in the United States District Court for the Middle District of Tennessee, the Honorable John Nixon, captioned *Memphis Planned Parenthood, Inc. v. Sundquist*, 2 F. Supp. 2d 997 (M.D. Tenn. 1997). This action involved a suit against the Governor of Tennessee, Don Sundquist, Attorney General John Knox Walkup, and the Administrative Director of the Courts ("ADC") Charles Ferrell challenging the constitutionality of the Parental Consent Act. *Id.*

In *Memphis Planned Parenthood*, the plaintiff argued that the Parental Consent Act was unconstitutional because the judicial bypass procedure was flawed inasmuch as it presented substantial issues of the minor's right of confidentiality and an expeditious disposition of her case. 2 F. Supp. 2d at 1000. The plaintiff in that case filed a motion for a preliminary injunction which was granted by the district court. *Id.* at 1009. The preliminary injunction enjoined enforcement of the Parental Consent Act *in toto*, finding that severability was not an option. *Id.* The preliminary injunction, which was effective *nunc pro tunc* August 26, 1997, further provided:

> It is FURTHER ORDERED that, pending further order of this Court, the defendants, their respective officers, agents, servants, employees, and attorneys, and all other persons in active concert or participation with them, are hereby

> restrained and enjoined from enforcing Tenn. Code Ann. §§ 37-10-301 through 37-10-307, the Parental Consent for Abortions by Minors Act.

(J.A. at 57.)

The defendants appealed to this Court, which reversed the grant of the preliminary injunction on May 5, 1999. *Memphis Planned Parenthood, Inc. v. Sundquist,* 175 F.3d 456 (6th Cir. 1999). After a petition for rehearing *en banc* was denied, the mandate of the Court reversing the grant of the preliminary injunction was issued on August 24, 1999.

On remand to the district court, the *Memphis Planned Parenthood* parties entered into a joint temporary restraining order which prevented the enforcement of the Parental Consent Act until such time as the State of Tennessee could ensure that the bypass procedure was in accordance with the Act, the Constitution, and the opinion of this Court.

In their respective answers to Plaintiffs' complaint, Defendants alleged that the Parental Consent Act was inapplicable to their case because the *Memphis Planned Parenthood* injunction prevented the enforcement of the Act at the time that Ashley Blackard obtained her abortion. The district court, however, granted a motion by Plaintiffs to strike Defendants' defense insofar as it relied on the *Memphis Planned Parenthood* injunction. Defendants thereafter filed a joint motion to reconsider, contending that the Parental Consent Act could not be applied constitutionally to abortion procedures during the pendency of the *Memphis Planned Parenthood* case because the injunction halted the implementation of the judicial bypass procedure. The district court denied Defendants' joint motion because, based on the record before it, it could not determine whether the Tennessee courts were within the scope of the injunction.

Defendants thereafter filed a motion for summary judgment or, in the alternative, relief from a prior order under Rule 60. The district court asked for and the parties submitted supplemental briefing. Defendants submitted affidavits from Andrew Shookhoff, a juvenile court judge at the time of Ashley Blackard's abortion, who

stated that it was his understanding that juvenile court judges did not have the power to hear judicial bypass cases while the injunction was in place. In addition, Defendants submitted an affidavit from the Clerk of the Juvenile Court of Memphis and Shelby County, C.R. "Bob" Martin, who stated that while the court would have accepted for filing petitions for a judicial bypass, the court would not have acted upon those petitions until after the injunction was lifted. Plaintiffs also submitted affidavits, including an affidavit from the current ADC and a juvenile court judge. Plaintiffs' affidavits essentially stated that the ADC did not have supervisory authority over the juvenile court judges.

After a review of the record, the district court granted Defendants' motion for relief from a prior order. In granting Defendants' motion for relief from a prior order, the district court determined that the Tennessee juvenile court system was in active concert with the ADC and was therefore also enjoined from hearing petitions for a waiver of consent under the Act. The district court also concluded that there was in fact no judicial bypass procedure in effect at the time of Ashley Blackard's abortion. Accordingly, the district court concluded, the Act could not constitutionally be enforced under *Bellotti v. Baird*, 443 U.S. 622 (1979). A violation of the Act therefore could not be a basis for Plaintiffs' claims.

The district court's order had the effect of dismissing Plaintiffs Michael and Sharon Blackard from the suit because their claims were based solely on the Parental Consent Act. Plaintiff Ashley Blackard's common law battery claim, however, remained viable. On this claim, the case went to trial. A jury found that Plaintiff Ashley Blackard was a "mature minor" under the laws of Tennessee and that her consent to the abortion procedure was therefore valid. Plaintiffs filed a motion for a new trial, which was denied. Judgment was thereafter entered in Defendants' favor.

Plaintiffs now appeal that judgment. Plaintiffs do not challenge the jury finding that Ashley Blackard was a mature minor under the laws of the state of Tennessee. Plaintiffs instead argue on appeal that the district court erred in granting Defendants' motion for relief from a prior order and thus preventing them from relying on the Parental Consent Act as a basis for their claims.

DISCUSSION

Standard of Review

We review the district court's order granting a Rule 60(b) motion for relief from a prior order or judgment for abuse of discretion. *Conte v. Gen. Housewares Corp.*, 215 F.3d 628, 639 (6th Cir. 2000); *Mfrs.' Indus. Relations Ass'n v. East Akron Casting Co.*, 58 F.3d 204, 207 (6th Cir. 1995). As always, however, we review questions of law *de novo* and questions of fact for clear error. *United States v. Murphy*, 241 F.3d 447, 456 (6th Cir. 2001). The district court's determination that the Tennessee juvenile courts were in active concert with the ADC is a finding of fact which we will only reverse if it is clearly erroneous. *See Reliance Ins. Co. v. Mast Constr. Co.*, 159 F.3d 1311, 1319 (10th Cir. 1998); *FDIC v. Faulkner*, 991 F.2d 262, 267 (5th Cir. 1993).

Analysis

In *Bellotti v. Baird*, 443 U.S. 622 (1979), the Supreme Court held that while states can require minors to obtain the consent of their parents prior to obtaining an abortion, the state must also provide an alternative by which a minor can go directly to the courts to obtain authorization for the abortion without notifying her parents. Statutes which do not contain an alternative or a judicial bypass procedure or statutes which contain a judicial bypass procedure which unduly burdens the right of a minor to obtain an abortion are unconstitutional. *Bellotti*, 443 U.S. at 639-44.

The district court granted Defendants' motion for relief from a prior order after concluding that, based upon the expanded record, the scope of the *Memphis Planned Parenthood* injunction included the Tennessee juvenile courts. The district court concluded that the reasoning of its earlier decision was flawed in that it thought the injunction only applied to enforcement of the criminal provision of the statute, but later realized that the plain language of the injunction applied to the Parental Consent Act *in toto*. The district court also found that the there was in fact no judicial bypass procedure in place at the time that Ashley Blackard received her abortion. Accordingly, the consent provision of the Act could not be enforced within the parameters of the

Constitution and *Bellotti*, which require effective judicial bypass procedures in order to have a constitutionally sound parental consent statute. The district court stated,

> [i]t is clear to the Court, from the record now presented, that Judge Nixon's injunction effectively blocked enforcement of the judicial bypass procedure contemplated by the Consent Act, and that no such judicial bypass procedure existed at the time of Ashley Blackard's abortion. For this reason, the Defendants cannot be charged with violating § 37-10-307 for failing to comply with Tennessee's abortion judicial bypass procedure. . . .

(J.A. at 618.)

Plaintiffs contend that the district court erred in granting Defendants' motion for relief from a prior order. We disagree. The district court did not abuse its discretion in granting Defendants' motion for relief from a prior order. The district court's finding that the Tennessee juvenile courts were in active concert with the ADC was not clearly erroneous. The district court properly found that the juvenile courts were bound by the *Memphis Planned Parenthood* injunction. The district court also properly found that there was no judicial bypass procedure in place at the time that Ashley Blackard received her abortion. Thus, the district court's conclusion that Defendants could not be liable under the Parental Consent Act in the absence of a judicial bypass procedure was proper. Absent the judicial bypass procedure, the Parental Consent Act could not operate to require either Defendants or Ashley Blackard to obtain parental consent prior to Ashley Blackard's abortion. *See Bellotti*, 443 U.S. at 643.

The status of the judicial bypass procedure, i.e., whether it was enforceable, at the time of Ashley Blackard's abortion, turns on the scope of the *Memphis Planned Parenthood* injunction. Contrary to what Plaintiffs would have this Court conclude, if the Tennessee juvenile courts were within the scope of the injunction, the juvenile courts could not ignore the injunction and enforce the

Parental Consent Act or its judicial bypass procedure. *Wolff Shoe Co. v. United States*, 141 F.3d 1116, 1122 (Fed. Cir. 1998) ("'[P]ersons subject to an injunctive order issued by a court with jurisdiction are expected to obey that decree until it is modified or reversed, even if they have proper grounds to object to the order.'") (quoting *GTE Sylvania, Inc. v. Consumers Union of the United States, Inc.*, 445 U.S. 375, 386 (1980)) (alteration in original). The law is clear that parties bound by an injunction are obligated to abide by that injunction when it is in effect even if it is later determined to be erroneous. We conclude that the Tennessee juvenile courts were within the scope of the *Memphis Planned Parenthood* injunction and could not enforce the statute during the pendency of that injunction.

Federal Rule of Civil Procedure 65(d) governs the scope of a preliminary injunction issued by a federal court. It provides that an injunction,

> is binding only upon the parties to the action, their officers, agents, servants, employees, and attorneys, and *upon those persons in active concert or participation with them* who receive actual notice of the order by personal service or otherwise.

Fed. R. Civ. P. 65(d). Rule 65(d) "is derived from the common law doctrine that a decree of injunction not only binds the parties defendant but also those identified with them in interest, in 'privity' with them, represented by them or subject to their control." *Regal Knitwear Co. v. NLRB*, 324 U.S. 9, 14 (1945). To determine whether a person is one who acts in concert or is identified in interest with the enjoined party, the court must look to the actual relationship between the person enjoined and the person thought to be bound by the injunction. *Id.*

In the instant case, the district court examined the relationship between the juvenile court and the ADC by looking at the statutory relationship between the two. Tennessee Code Annotated § 16-3-803 governs the powers and duties of the ADC. Section 16-3-803 provides in pertinent part:

(a) The administrative director of the courts shall work under the supervision and direction of the chief justice and shall, as the chief administrative officer of the state court system, assist the chief justice in the administration of the state court system to the end that litigation may be expedited and the administration of justice improved.

(b) The administrative director of the courts shall serve as secretary to the judicial council, shall perform those duties enumerated in § 16-3-502, and shall attend to such other duties as may be assigned by the supreme court or chief justice thereof. As secretary to the judicial council, the administrative director of the courts shall provide staff and secretarial support for all functions of the judicial council.

* * *

(d) The administrative director of the courts shall, within budgetary limitations, provide the judges of the trial courts of record with minimum law libraries, the nature and extent of which shall be determined in every instance by the administrative director on the basis of need. All books furnished shall remain the property of the state, and shall be returned to the custody of the administrative director by each judge upon the retirement or expiration of the official duties of such judge.

* * *

(f)(1) The administrative director of the courts shall, within the limit of appropriated funds, prepare for the supreme court's approval an annual judicial education plan providing for the orientation and continuing training and education of all elected or appointed judges of trial and appellate courts of record of this state.

* * *

(g) The administrative director of the courts shall continuously survey and study the operation of the state court system, the volume and condition of business in the courts of the state, whether of record or not, the procedures employed by those courts, and the quality and responsiveness of all of the courts with regard to the needs of civil litigants and the needs

> of the criminal justice system throughout the state. The administrative director of the courts shall also provide liaison and staff support to the judicial council with regard to the responsibilities of the judicial council in the above areas.
> (h) The administrative director of the courts shall establish criteria, develop procedures and implement a Tennessee court information system (TnCIS). The system shall provide an integrated case management and accounting software system addressing the statutory responsibilities of the clerks of the general sessions, chancery, circuit, and juvenile courts. . . .
>
> * * *
>
> (i) For the purposes of monitoring the operation of the state court system, reducing unnecessary delay, and assessing the responsiveness of the state court system to the needs of litigants, victims of crime, and the citizens of the state, the administrative director of the courts shall have the responsibility for annually collecting, compiling, analyzing, and publishing caseload statistics pertaining to the state court system. It is the responsibility of the administrative director of the courts to develop, define, update, and disseminate standard, uniform measures, definitions, and criteria for collecting statistics pertaining to the state court system. These standards and reporting requirements shall be used for uniform statistical data collection in all of the courts throughout the state as established by the rules of the supreme court.

Tenn. Code. Ann. § 16-3-803.

After a review of the record, including affidavits from both parties regarding the injunction, the duties of the ADC, and the statutory relationship between the ADC and the Tennessee courts, including the juvenile courts, the district court held that, the Administrative Director of the Courts of Tennessee acts 'in active concert or participation with' the courts of the State of Tennessee, including the juvenile judges who were responsible for implementing the judicial

bypass procedure under the Consent Act. . . . From this review of the Administrative Director's duties, it is clear to the Court that the Administrative Director is in a privity relationship with the courts of the State of Tennessee.
(J.A. at 616-17.)

We do not believe the district court's conclusion was clearly erroneous. The relationship between the ADC and the courts of Tennessee demonstrates that the Tennessee courts were identified in interest with the ADC. The ADC is responsible for the orientation and continued education of the judges of the state courts and for the orderly operation of the court system. It naturally follows that the ADC would be responsible for educating the state court judges on injunctions prohibiting the enforcement of potentially unconstitutional statutes. And while the ADC does not have direct supervisory authority over the judges of the state courts, the ADC is responsible for assisting the chief justice of the Supreme Court, who does have such authority, with the administration of the state court system. Furthermore, the ADC is the "chief administrative officer of the state court system." Tenn. Code Ann. § 16-3-803. Based on the duties of the ADC, it was not clearly erroneous for the district court to conclude that the ADC and the state courts, including the juvenile courts, were in active concert and participation. In other words, the relationship between the ADC and the state courts demonstrates that there was an identity of interests or privity between the two. We consider a contrary conclusion to be misguided inasmuch as the judges of the court system have the actual power to enforce a statute, not the ADC, despite the that he or she is the "chief administrative officer of the state court system." To enjoin the ADC without having that injunction reach the judges of the various courts would be meaningless where the purpose of the injunction is to prevent the enforcement of a potentially unconstitutional statute.

Plaintiffs argue that the district court's determination that the juvenile courts were in active concert with the ADC was erroneous because the ADC did not have supervisory authority over the juvenile courts. In support of their contention, Plaintiffs submitted two affidavits. The affidavit of the current ADC, Cornelia A. Clark, stat-

ed that the ADC had no statutory or other authority to control the juvenile court judges. Plaintiffs also submitted the affidavit of a juvenile court judge, who stated that the ADC, acting alone, did not have supervisory authority or control over juvenile court judges. As the district court concluded, Plaintiffs' definition of "in active concert or participation" is overly narrow and does not comport with the law. It is not necessary that the enjoined party control the third party in order for the third party to be bound by the injunction. The third party is bound by an injunction if that party is identified with the named, enjoined party in interest, in 'privity' with it, represented by it ***or*** subject to its control. *Regal Knitwear*, 324 U.S. at 14. In the instant case, despite the fact that the ADC may not have supervisory authority or control over the juvenile court judges, the ADC is identified in interest and acts in concert or participation with the state court system including the juvenile court judges. We therefore reject Plaintiffs' argument and conclude that the consent provision of the Parental Consent Act could not be enforced constitutionally where the juvenile court judges were enjoined from enforcing the judicial bypass procedure of the Act.

Furthermore, the district court properly concluded that there was in fact no judicial bypass procedure in place at the time of Ashley Blackard's abortion even if it existed theoretically or on paper. The *Bellotti* principle that a state may not require parental consent before a minor may obtain an abortion in the absence of an adequate judicial bypass procedure has been reaffirmed time and time again. *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833, 899 (1992) ("Our cases establish, and we reaffirm today, that a State may require a minor seeking an abortion to obtain the consent of a parent or guardian, provided that there is an adequate judicial bypass procedure."). A state statute requiring parental consent does not pass constitutional muster merely because a judicial bypass procedure exists in theory or on paper. An adequate judicial bypass procedure must ensure that the issue of waiver of the parental consent requirement is resolved, including appeals, in a sufficiently anonymous and expeditious fashion to provide an effective opportunity for an abortion to be obtained. *Planned Parenthood of Blue Ridge v.*

Camblos, 116 F.3d 707, 710 (4th Cir. 1997) (citing *Bellotti*, 434 U.S. at 643-44).

In the instant case, there was uncontroverted evidence before the district court that no effective mechanism for a judicial bypass existed at the time of Ashley Blackard's abortion. Defendants submitted an affidavit from the clerk of the juvenile court, who stated that,

> . . . [d]uring the time that [the *Memphis Planned Parenthood*] injunction was in force and effect, and in compliance with this . . . injunction, the Juvenile Court of Memphis and Shelby County, Tennessee did not implement or operate the judicial bypass procedure provided by the Tennessee Parental Consent for Abortions by Minors Act.
> 3. To my knowledge, the Juvenile Court of Memphis and Shelby County Tennessee has not heard any judicial bypass petitions since 1995.
> 4. As the Clerk of the Juvenile Court of Memphis, Shelby County, Tennessee, if a citizen had attempted to file a petition for a judicial bypass of the Parental Consent for Abortions by Minors Act under Tennessee Supreme Court Rule 24 in March 1998 or at any time when the injunction was in effect, I would have accepted the petition for filing. However, as an officer of the court I would have obeyed the above referenced injunctive Order of the United States District Court for the Middle District of Tennessee and therefore would not have acted upon the Rule 24 judicial bypass petition, nor would the Juvenile Court have acted on the petition.

(J.A. at 422-23) (affidavit of C.R. "Bob" Martin, Court Clerk of the Juvenile Court of Memphis and Shelby County, Tennessee). In addition, Defendants submitted the affidavit of a former juvenile court judge who was an active judge at the time of Ashley Blackard's abortion; this affidavit provided that:

> 3. Among my responsibilities during my tenure as a judge was presiding over petitions filed by minors seeking waiver of the requirement that they obtain a parent's consent for

termination of pregnancy. The requirement that the minor obtain parental consent, and that she be able to petition the juvenile court for a waiver of the consent requirement, was established by the Parental Consent for Abortions by Minors Act, Tenn. Code Ann. §§ 37-10-301 to -307. In particular, the Act conferred upon minors who elected not to seek consent of a parent the right to petition the juvenile court for relief. While on the bench, I presided over a number of bypass hearings pursuant to this law during those periods when the Act was not enjoined.

4. During my time on the bench, I complied with the requirements of the law regarding the Parental Consent for Abortions by Minors Act. On more than one occasion during my tenure, the Act was enjoined by Judge Nixon of the United States District Court. When these injunctions were in effect against the Act, it was my understanding that the juvenile court did not have the legal authority to hear a minor's petitions for judicial waiver of the parental consent requirement.

(J. A. at 535-36) (affidavit of Honorable Andrew J. Shookhoff).

There was also additional evidence which supported the district court's conclusion that the judicial bypass procedure did not in fact exist at the time of Ashley Blackard's abortion. After this Court reversed Judge Nixon's order granting the injunction in the *Memphis Planned Parenthood* case, on remand, the parties entered into a joint temporary restraining order (the "joint TRO"). The joint TRO continued to enjoin the enforcement of the Parental Consent Act until such time as the defendants ensured the court that the judicial bypass procedure would be in compliance with the requirements of the Parental Consent Act, the decision of this Court, and the Constitution. The joint TRO further provided that counsel for the defendants would inform the judges that the Parental Consent Act would not become effective until December 15, 1999. Affidavits submitted in support of the joint TRO provided that communication with various entities charged with implementing the Act including

the juvenile court system and the Tennessee Department of Children Services indicated that the State of Tennessee was not prepared to implement the judicial bypass procedure required under the Act as of August of 1999. The affidavits showed that some county juvenile courts were either unaware of the judicial bypass procedure or did not currently have the means by which to implement it. In other counties such as Shelby County (Memphis) where the juvenile courts stated that they were ready to implement the judicial bypass procedure, other essential constitutional elements were lacking, such as established policy and procedures or training for the court advocates that were supposed to assist the minors.

Though Plaintiffs failed to contest this evidence in the district court, they now contend that this Court should not consider it. They argue that (1) the district court did not make a finding as to whether there was a judicial bypass procedure in place at the time Ashley Blackard received her abortion; (2) that the supplemental briefing order focused on the issue of whether the juvenile court judges acted in concert with the ADC; and (3) Ashley Blackard never sought a judicial bypass. The first contention is simply not true as clearly indicated by references to the record above. The second and third contentions are irrelevant. It is irrelevant that the supplemental briefing order specifically requested briefing on the "in active concert" issue inasmuch as Plaintiffs, if they thought the statements of the affidavits submitted by Defendants were false, nevertheless could and should have presented evidence demonstrating the falsity. It is equally irrelevant that Ashley Blackard did not actually seek a judicial bypass because even if she had, the evidence demonstrates that the bypass procedure would not have been available to her.

The evidence on the record is sufficient to support the district court's finding that there was no judicial bypass procedure in place at the time that Ashley Blackard obtained her abortion. Although the judicial bypass procedure existed on paper and in theory, there was no working mechanism by which Ashley Blackard, or any other minor for that matter, could have obtained a waiver of the consent provision during the relevant time period. Because there was no judicial bypass procedure, the consent provision of the Parental Consent Act cannot constitutionally be enforced against

Defendants. *See Casey*, 505 U.S. at 899. Therefore, the district court properly concluded that Defendants could not be held liable under the statute for failing to obtain consent from Ashley Blackard's parents prior to performing her abortion.

Despite our belief that the law is clear regarding the outcome of this case, we must nevertheless address the arguments raised by Plaintiffs as to why the preliminary injunction should not be implemented as the court intended. Plaintiffs argue that the preliminary injunction, which prevented the enforcement of the judicial bypass procedure of the Parental Consent Act, should have no bearing on their case. They argue that (1) because they and Defendants were not parties to the *Memphis Planned Parenthood* lawsuit, they could not be bound by the injunction, nor could they be collaterally estopped from bringing their claims; (2) the district court is not a state actor and therefore cannot declare a state statute unconstitutional; and (3) even if the injunction was binding on the courts of Tennessee, Defendants violated the statute at their own peril and cannot now claim immunity from suit. To the extent that these arguments are credible, and we express no confidence in their credibility, they are misplaced and clearly demonstrate that Plaintiffs misunderstand the rationale of the district court's decision.

Plaintiffs first contend that because neither they nor Defendants were parties to the *Memphis Planned Parenthood* suit, they could not be bound by the injunction issued in that case. This argument clearly misses the point. The district court's ruling did not hold that Plaintiffs or Defendants were enjoined by the injunction. We agree with Plaintiffs' argument that such a ruling would likely offend the principles of due process. *See United States Steel Corp. v. United Mine Workers of Am.*, 519 F.2d 1236, 1246 (5th Cir. 1975). However, no such ruling was made by the district court in this case. The district court instead determined that the courts of the State of Tennessee were bound by the injunction and the effect of that injunction was to nullify the judicial bypass procedure of the Parental Consent Act, a constitutionally necessary component of the Act. While the court's ruling that the Act could not be enforced in the absence of the judicial bypass procedure resulted in the dismissal of Plaintiffs Michael and Sharon Blackard's claim, the court

did not conclude that Plaintiffs themselves were specifically enjoined. Plaintiffs' argument is therefore misplaced.

Plaintiffs next argue that the district court's injunction could not render the Parental Consent Act unconstitutional because Judge Nixon, the district court judge in *Memphis Planned Parenthood*, was not a state actor. This argument is as equally flawed as the first inasmuch as it represents a fundamental misunderstanding of this case. Plaintiffs' argument suggests that a federal district court could never exercise jurisdiction to enjoin the enforcement of a state law even if it determines that the law is unconstitutional. This logic, however, does not follow from the case law and the jurisdiction of the federal courts to issue injunctions and entertain federal questions, including constitutional questions. *See Doud v. Hodge*, 350 U.S. 485, 487 (1956) ("This Court has never held that a district court is without jurisdiction to entertain a prayer for an injunction restraining the enforcement of a state statute on grounds of alleged repugnancy to the Federal Constitution . . . . We hold that the District Court has jurisdiction of this cause.").

The premise underlying Plaintiffs' argument is also erroneous. The requirement that there be state action in the context of constitutional violations refers to government action—state or federal—as opposed to private action. *Dobyns v. E-Systems, Inc.*, 667 F.2d 1219, 1220 n.1 (5th Cir. 1982); Black's Law Dictionary 1407 (6th ed. 1990) (state action refers to "term used in connection with claims under due process clause and Civil Rights Act for which a private citizen is seeking damages or redress because of improper governmental intrusion into his life"). We therefore reject Plaintiffs' second contention.

Lastly, Plaintiffs' argument that even if the injunction was binding on the courts of Tennessee and the bypass procedure did not exist at the time of Ashley Blackard's abortion, Defendants violated the statute at their own peril and cannot now claim blanket immunity from suit is without merit. Plaintiffs argue that "the issuance of Judge Nixon's injunction *at best* acted as a temporary bar to plaintiffs bringing a cause of action, but did not absolve the defendants of liability under the Act." Appellant's Br. at 42 (emphasis in original). Essentially, Plaintiffs are arguing that the parental

consent provision of the Act should be enforced against Defendants despite the fact that Ashley Blackard could not seek a judicial waiver of that provision. Such a result, however, would unduly burden a minor's right to an abortion. If there is no judicial bypass procedure in place, neither the minor nor her physician can legally be required to seek parental consent. *See Casey,* 505 U.S. at 899. As Defendants have noted, to allow this litigation to go forward would be tantamount to fostering an unconstitutional regime.

To support their contention, Plaintiffs cite Justice Stevens' concurring opinion in *Edgar v. Mite Corp.*, 457 U.S. 624, 647 (1982). However, the *Edgar* case is distinguishable from the case at bar. In *Edgar*, Mite brought a suit seeking to enjoin an Illinois law, after it had already violated the law, to avoid prosecution by the state of Illinois. In this case, however, Defendants' relied on a previously issued and enforceable injunction. In addition, whereas *Edgar* involves business rights, this case involves the fundamental right of a female minor to have an abortion. The district court effectively addressed this argument in its order denying Plaintiffs' motion for a new trial:

> Apart from the fact that Justice Stevens [sic] views were not endorsed by a majority of the Court, his reasoning in *Edgar* is not controlling for two reasons. The first reasons [sic] is that the Illinois statute made the underlying activity (engaging in corporate take-overs) more difficult, but not impossible to perform without violating the statute. While the preliminary injunction was in effect, individuals who desired to tender a take-over offer without risking violation of the statute needed only to comply with the statute's requirements by registering with the appropriate state entities, giving the required notice, etc.
>
> In the case *sub judice*, however, Judge Nixon's preliminary injunction made it not just difficult, but impossible for some minors (including Ashley Blackard) to receive abortions without violating the statute. As this Court previously found, the effect of Judge Nixon's Order was to prevent the implementation of the Tennessee judicial bypass procedure. Yet, the Consent Act required minors with unconsenting

parents to obtain judicial consent prior to obtaining an abortion. This consent was simply impossible to obtain due to the absence of a bypass procedure. In such circumstances, minors with unconsenting parents were required to violate the statute in order to exercise their fundamental right to an abortion.

A second reason that the *Edgar* case is not analogous is that reliance upon a declaratory judgment action is not constitutionally sufficient recourse in the context of abortion. The right to an abortion is constitutionally protected. *See Planned Parenthood of Southeastern Pennsylvania v. Casey,* 505 U.S. 833, 869 (1992). States may impose certain restrictions upon the right to an abortion, but those restrictions may not impose an "undue burden" on a woman's right to receive an abortion. *Id.* at 874. States may constitutionally require minors to obtain a parent's consent to an abortion, but only if the state also provides a judicial bypass procedure by which the minor may obtain judicial consent to an abortion. See *Bellotti v. Baird*, 443 U.S. 622, 643 (1979). To be constitutional, such a bypass procedure must "be completed with anonymity and sufficient expedition to provide an effective opportunity for an abortion to be obtained." *Bellotti*, 443 U.S. at 644. It cannot be reasonably disputed that requiring a minor to file a declaratory judgment action in federal court in order to obtain an abortion would not meet the constitutional requirements of expediency or confidentiality. *See, e.g., Planned Parenthood of Southern Arizona v. Lawall*, 180 F.3d 1022, 1027-30 (9th Cir. 1999) (holding that a bypass scheme which did not contain specific deadlines within which the court must rule on the consent request is an "undue burden" on the right to an abortion).

Under *Bellotti*, the constitutionality of Tennessee's parental consent requirement hinged upon the actual implementation of a judicial bypass procedure. The mere theoretical provision of bypass procedure in an enjoined statute is not sufficient. Even though Judge Nixon's preliminary

> injunction was ultimately overturned, the fact remains that his injunction had the practical effect of preventing the bypass procedure from becoming a reality during the time that the injunction was in effect. Until such time as the judicial bypass procedure was actually implemented, Tennessee could not constitutionally require minors to obtain parental consent to an abortion, and could not impose civil liability upon persons who failed to comply with the Consent Act.

(J.A. at 685-86.) We therefore reject Plaintiffs' contention that Defendants failed to obtain the consent of Ashley Blackard's parents at their own peril.

CONCLUSION

We conclude that the district court properly granted Defendants' motion for relief from a prior order. The district court did not commit clear error in determining that the Tennessee juvenile courts were in active concert and participation with the ADC, a named Defendant in the *Memphis Planned Parenthood* case, and were therefore enjoined from enforcing the Parental Consent Act and its judicial bypass procedure. The record also supports the district court's determination that no judicial bypass procedure in fact existed at the time of Ashley Blackard's abortion. The district court therefore could not, consistent with *Bellotti* and its progeny, hold Defendants liable for failing to obtain the consent of Ashley Blackard's parents prior to her abortion as required by the Parental Consent Act. Accordingly, we **AFFIRM** the district court's order granting Defendants' motion for relief from a prior order and thus the final judgment in this case.

Appendix B
Blackard v. M.A.M.C.W., Order Granting Motion for Relief from Prior Order (W.D. Tenn. Nov. 19, 1999)

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TENNESSEE
WESTERN DIVISION

MICHAEL BLACKARD and SHARON BLACKARD, as parents, individuals, guardians, and next friends to ASHLEY BLACKARD, a minor,

Plaintiffs,

vs.

MEMPHIS AREA MEDICAL CENTER FOR WOMEN, INC., et al.

Defendants.

No. 98-2996 Ml/A

ORDER GRANTING MOTION
FOR RELIEF FROM A PRIOR ORDER
(Filed November 19, 1999)

This case is before the Court on Joint Motion of Defendants For Summary Judgment Under Rule 56 or for Relief Under Rule 60(b).

Defendants argue, in essence, that Plaintiffs may not rely upon Tenn. Code Ann. § 37-10-307 to establish Defendants' liability for battery and interference with family relations. Defendants argue that, at all times relevant to this litigation, the Tennessee Parental Consent for Abortions by Minors Act ("the Consent Act"), Tenn. Code Ann. §§ 37-10-301 through 37-10-307, had been preliminary enjoined from enforcement by Judge Nixon of the Middle District of Tennessee. Defendants contend that Judge Nixon's injunction

was broad enough in scope to prevent Plaintiff from invoking any protection afforded by the tort liability provision of the Act.

Defendants Motion raises the same arguments previously raised by Defendants in the Motion to Dismiss filed March 30, 1999, and Defendants Motion For Reconsideration filed July 9, 1999. The Court previously denied both Motions. Because the present Motion presents no new grounds for granting summary judgment, the Court will decide this Motion as a motion for relief from a previous order under Rule 60(b).

A threshold issue for resolving this Motion is whether Judge Nixon's Order was broad enough in scope to enjoin Tennessee State courts from implementing the statutory bypass procedure. The parties have supplemented the record on this issue and made additional arguments to the Court. Given this expanded record, the Court GRANTS Defendants' Motion for Relief under Rule 60(b). The Court HOLDS that Tenn. Code Ann. § 37-10-307 may not be utilized by Plaintiff to prove battery or interference with family relations in this case. However, Plaintiffs' causes of action are not dismissed. Plaintiff has also stated claims under pre-statutory common law for battery and interference with family relations. Plaintiff may pursue these claims.

I.

The following facts are undisputed. In March 1998, Ashley Blackard,[1] then seventeen years old, learned that she was pregnant. With the assistance of her boyfriend, Ashley contacted the Memphis Area Medical Center for Women (MAMCW) and made an appointment for March 26, 1998. That day, she traveled to MAMCW in Memphis, Tennessee where Dr. Manejwala performed an abortion upon Ashley. Ashley's parents were not aware of her pregnancy or abortion at the time of the procedure, nor had Ashley sought a judicial waiver of their consent.

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[1] Although the Court typically refers to parties by their last names, the Court has in previous orders, and will again in this order, refer to Ashley Blackard by her first name to avoid potential confusion with her mother.

A previous Order of this Court describes the "tortuous history" of Tennessee statutes regulating the provision of abortions to minor women. See Order entered June 29, 1999. For purposes of this Motion, the following events are critical. The Tennessee legislature passed the Parental Consent for Abortions by Minors Act in 1995. The Consent Act prohibits doctors from performing abortions upon unemancipated minors without the consent of one of the minor's parents or legal guardians. If the minor's parents or guardians refuse to consent, or if the minor elects not to seek their consent, then the minor may obtain a judicial waiver of the consent requirement from a juvenile court judge. See Tenn. Code Ann. § 37-10-303. The Act contains various requirements pertaining to the juvenile court bypass proceeding, such as measures designed to ensure confidentiality and requirements for appeal. See Tenn. Code Ann. § 37-10-304. The Act requests that the Supreme Court of Tennessee promulgate any rules necessary to implement the judicial bypass procedure. See § 37-10-304(i). The Supreme Court did in fact subsequently promulgate Rule 24, which was designed to implement the judicial bypass. See Tenn. Sup. Ct. R. 24.

The Consent Act criminalizes nonconformity with its provisions by stating that "[a]ny person who intentionally perform an abortion with knowledge that, or with reckless disregard as to whether the person upon whom the abortion is to be performed is an unemancipated minor, and who intentionally or knowingly fails to conform to any requirement of this part, commits a Class A misdemeanor." § 37-10-306. The Consent Act also contains the tort liability section, which is the subject of the present Motion, and which states:

> Failure to obtain consent pursuant to the requirements of this part is prima facie evidence of failure to obtain informed consent and of interference with family relations in appropriate civil actions. The law of this state shall not be construed to preclude the award of exemplary damages in any appropriate civil action relevant to violations of this part. Nothing in this part shall be construed to limit the common law rights of parents.

Tenn. Code Ann. § 37-10-307.

Shortly after the Tennessee legislature adopted the Consent Act, Memphis Planned Parenthood, Inc. filed suit in the Middle District of Tennessee seeking to enjoin enforcement of the Consent Act and Rule 24. Defendants in that law suit were Donald Sundquist, Governor of the State of Tennessee, J. Knox Walkup, Attorney General of the State of Tennessee, and Charles Ferrell, Administrative Director of the Courts of Tennessee, each in their official capacities. In 1997, Judge Nixon entered a preliminary injunction which restrained enforcement of the Consent Act. The defendents appealed and, because of subsequent changes by the Tennessee Supreme Court to Rule 24, the Sixth Circuit vacated the injunction as moot and remanded the case to the Middle District of Tennessee for further consideration. See Memphis Planned Parenthood, Inc. v. Sundquist, 121 F.3d 708 (6th Cir. 1997).

Upon remand, Judge Nixon again concluded that the Consent Act unconstitutionally burdened a minor's right to obtain an abortion. Memphis Planned Parenthood, Inc. v. Sundquist, 2 F.Supp.2d 997 (M.D. Tenn. 1997). Judge Nixon again issued a preliminary injunction which stated:

> It is FURTHER ORDERED that, pending further order of this Court, the defendants, their respective officers, agents, servants, employees, and attorneys and all other persons in active concert or participation with them, are hereby restrained and enjoined from enforcing Tenn. Code Ann. §§ 37-10-301 through 37-10-307, the Parental Consent for Abortions by Minors Act.
>
> This amended Order shall be effective nunc pro tunc August 26, 1997.

Memphis Planned Parenthood, Inc. v. Sundquist, No. 3:89-0520 (M.D. Tenn. Sept. 15, 1997). On May 5, 1999, the Court of Appeals for the Sixth Circuit reversed the Middle District's Order and again remanded the case to the Middle District of Tennessee. See Memphis Planned Parenthood, Inc., v. Sundquist, 175 F.3d 456 (6th Cir. 1999).

II.

On March 26, 1998, at the time that Dr. Manejwala performed an abortion upon Ashley Blackard, the legal effect of the Consent Act was subject to Judge Nixon's preliminary injunction. A threshold issue for deciding the present Motion is whether the injunction was broad enough in scope to enjoin Tennessee state courts from implementing the statutory judicial bypass procedure. This Court has twice before held that the injunction was not so broad. In the Order denying Defendants' Motion to Dismiss, the Court held that "the preliminary injunction that was outstanding at the time of the events underlying this litigation has no legal relevance to the duties imposed by Tennessee law upon the parties to this action." Order entered June 29, 1999 at 5. In that Order, the Court relied upon the fact that the criminal provision of the Consent Act, rather than the tort liability section, was at issue in the Middle District litigation, see id. at 6, and that Plaintiffs in the case sub judice are not similarly situated to the State of Tennessee in the Middle District litigation, see id. at 7-8.

Based on the expanded record submitted for the present Motion, the Court now concludes that this reasoning was flawed. By its plain terms, Judge Nixon's injunction enjoined enforcement of the entire Consent Act, "§§ 37-10-301 through 37-10-307", not merely the criminal provision contained in § 305. Furthermore, the opinion issued contemporaneously with the injunction thoughtfully considered the issue of severability. See Memphis Planned Parenthood, 2 F.Supp.2d at 1008-09. The Court concluded that, because the Consent Act contained no express severability clause or other indication that severability was proper, the Act should be enjoined as a whole. Id. There can be no doubt that Judge Nixon intended to enjoin the entire Consent Act, and did in fact expressly enjoin § 307, the provision relied upon by Plaintiffs.

On July 9, 1999, Defendants filed a Motion for Reconsideration of the Court's June 28 Order. In support of the Motion, Defendants asserted that "at the time of Ashley Blackard's abortion, and indeed throughout the pendency of the preliminary injunction, there was no judicial bypass procedure in place in Tennessee." Defendants' Memorandum of Law in Support of Defendants' Motion for

Reconsideration at 5. The Court, however, found that Defendant had not submitted sufficient summary judgment evidence to support this proposition. Specifically, the copy of Judge Nixon's Order enjoining enforcement of the Consent Act submitted by Defendants listed only "Donald Sundquist, et al." as the defendants to that action. From that record, this Court could not determine whether the juvenile courts of Tennessee were within the scope of the injunction. See Order entered August 10, 1999.

Based upon the supplemental record submitted in support of the present Motion, the Court HOLDS that the juvenile courts of Tennessee were in fact enjoined from implementing the judicial bypass procedure contemplated by the Consent Act. Defendants have submitted a copy of the original complaint in the Middle District litigation which shows that Donald Sundquist, Governor of the State of Tennessee, J. Knox Walkup, Attorney General of the State of Tennessee, and Charles Ferrell, Administrative Director of the Courts of Tennessee were all named as defendants. Thus, Judge Nixon's order, which expressly enjoined all defendants from implementing the Consent Act, applied to all three of these defendants.

Plaintiffs nevertheless argue that the injunction was not broad enough in scope to enjoin the juvenile judges of Tennessee from implementing a judicial bypass procedure. Plaintiffs correctly argue that the Administrative Director has no supervisory authority or policymaking authority over Tennessee juvenile judges. The Administrative Director's duties are defined by Tenn. Code Ann. §§ 16-3-801 et seq. None of these duties entail substantive judicial authority, such as the authority to implement a judicial bypass procedure. Plaintiff's position is further supported by the affidavit of Cornelia A Clark, the current director of the Administrative Office of the Courts, who states that "[t]he Administrative Director of the Courts has no statutory or other authority to control the juvenile court judges or the circuit court judges of the State of Tennessee. The Administrative Director of the Courts has no power to order a juvenile judge or a circuit court judge to act, or to refrain from acting." Affidavit of Cornelia A. Clark at 1-2. Plaintiffs also submit the affidavit of Judge Kenneth A. Turner, a Juvenile Court Judge of Shelby County, Tennessee in which Judge Turner states that "[t]o

my knowledge, the duties of the Administrative Director of the Administrative Office of the Court are ministerial in nature, and mainly concern managing the financial aspects of the Judicial Department, and other routine administrative functions. To my knowledge, the Director of the Administrative Office of the Courts does not establish judicial policy for the State of Tennessee." Turner Affidavit at 1-2.

Plaintiff concludes from this evidence that "an injunction solely against Mr. Charles Ferrell could not possibly bind the circuit and juvenile judges of Tennessee, since Mr. Ferrell had no control over the circuit or juvenile judges of Tennessee." Plaintiff's Supplemental Briefing at 4. The Court disagrees. Rule 65(d) states that "Every order granting an injunction . . . is binding only upon the parties to the action, their officers, agents, servants, employees, and attorneys, and upon those persons in active concert or participation with them who receive actual notice of the order by personal service or otherwise." While this rule "codifies the well-established principle that, in exercising equitable powers, a court 'cannot lawfully enjoin the world at large,'" New York v. Operation Rescue Nat'l, 80 F.3d 64, 70 (2d Cir. 1996), it also codifies the notion that the judge's equitable powers are not limited solely to the parties to the litigation. Instead, Rule 65 expressly states that a preliminary injunction also binds those that are "in active concert or participation with" the parties. Fed. R. Civ.P. 65(d).

To be in active concert or participation with a party, one need not have supervisory authority or control over the party, as Plaintiffs contend. "Rule 65(d) 'is derived from the common-law doctrine that a decree of injunction not only binds the parties defendant but also those identified with them in interest, in 'privity' with them, represented by them or subject to their control.'" Golden State Bottling Co. v. NLRB, 414 U.S. 168, 179 (1973) (emphasis added). See also Regal Knitware v. NLRB, 324 U.S. 9, 14 (1942). Plaintiff's argument assumes too narrow a view of the Court's equitable powers.

The Court also finds, on the basis of the record now presented, that the Administrative Director of the Courts of Tennessee acts "in active concert or participation with" the courts of the State of Tennessee, including the juvenile judges who were responsible for

implementing the judicial bypass procedure under the Consent Act. By statute, the Director has a duty to "assist the Chief Justice [of the Supreme Court of Tennessee] in the administration of the state court system." Tenn. Code Ann. § 16-3-803(a). The Director acts as secretary to the Judicial Council of the State of Tennessee. Tenn. Code Ann. § 16-3-502(b). The Administrative Director has statutory duties to "establish criteria, develop procedures, and implement a statewide court system and case management information system." Tenn. Code Ann. § 16-3-502(h). The Administrative Director annually collects, compiles, analyzes and publishes caseload statistics pertaining to the state court system. Tenn. Code Ann. § 16-3-803(i). The Administrative Director is charged with conducting an "ongoing internal review, analysis, and planning for the future needs of the state court system" in order to "devise ways of simplifying court system procedure, expediting the transaction of court system business, and correcting weaknesses in the administration of justice." Tenn. Code Ann. § 16-3-803(k). From this review of the Administrative Director's duties, it is clear to the Court that the Administrative Director is in a privity relationship with the courts of the State of Tennessee.

It is not disputed by the parties that Judge Nixon intended to enjoin Tennessee Courts from implementing the judicial bypass procedure called for by the Consent Act. Defendants submit the Affidavit of Andrew J. Shookhoff, who was a Juvenile Court Judge for Davidson County, Tennessee, at the time Ashley Blackard's abortion occurred. Shookhoff states that he presided over a number of abortion bypass proceedings pursuant to the Consent Act during the periods of time when the Act was not enjoined. Shookhoff further states that "[o]n more than one occasion during my tenure, the Act was enjoined by Judge Nixon of the United States District Court. When these injunctions were in effect against the Act, it was my understanding that the juvenile court did not have the legal authority to hear a minor's petitions for judicial waiver of the parental consent requirement." Shookhoff Affidavit at 2.

It is clear to the Court, from the record now presented, that Judge Nixon's injunction effectively blocked enforcement of the judicial bypass procedure contemplated by the Consent Act, and that no

such judicial bypass procedure existed at the time of Ashley Blackard's abortion. For this reason, the Defendants cannot be charged with violating § 37-10-307 for failing to comply with Tennessee's abortion judicial bypass procedure. See, e.g. Eubanks v. Brown, 604 F. Supp. 141, 149 (W.D.Ky. 1984) (refusing to apply to defendants an abortion tort liability statute that had previously been found unconstitutional).

Defendant's Motion for Relief from this Court's previous Order is GRANTED. Plaintiffs may not rely upon Tenn. Code Ann. § 37-10-307 to prove any elements of their battery or interference with family relations claims.

III.

Having granted Defendant's Motion, several unresolved legal issues remain in this case. Among these issues are: (1) the precise law applicable to Plaintiff's tort claims; and (2) whether the common law may impose upon doctors a duty to obtain parental consent in the absence of a judicial bypass procedure.

This case is set for a pretrial conference on Tuesday, November 23, 1999. At that time, the parties should be prepared to discuss any unresolved legal issues. The parties should also be prepared to discuss possible amendments to the schedule, including a possible postponement of the trial date, in order to allow the Court to resolve any remaining issues.

ENTERED this 19th day of November, 1999.

/s/ Jon P. McCalla
JON P. McCALLA
UNITED STATES DISTRICT JUDGE

Appendix C
Blackard v. M.A.M.C.W., Order Denying Motion for New Trial (W.D. Tenn Feb. 11, 2000)

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TENNESSEE
WESTERN DIVISION

MICHAEL BLACKARD and SHARON BLACKARD, as parents, individuals, guardians, and next friends to ASHLEY BLACKARD, a minor,

Plaintiffs,

vs.

MEMPHIS AREA MEDICAL CENTER FOR WOMEN, INC., et al.

Defendants.

No. 98-2996 MI/A

ORDER DENYING MOTION FOR A NEW TRIAL
(Entered on Docket Sheet February 11, 2000)

This case is before the Court on Plaintiff's Motion for a New Trial. The parties presented this case to a jury, and the jury found for Defendants. For the reasons stated below, the Motion for a New Trial is DENIED.

Plaintiff's Motion argues that the Court erred by refusing to apply the tort liability provision of the Tennessee Parental Consent to Abortion by Minors Act, Tenn. Code Ann. § 37-10-307, to this case. Specifically, Plaintiff argues that the Court should have instructed the jury that Defendants' failure to insure that Plaintiff received either parental or judicial consent prior to obtaining an abortion is prima facie evidence of battery.

The Tennessee Parental C nsent to Abortions by Minors Act requires that minors who wis o have an abortion must first obtain the consent of either a paren r a juvenile judge. See Tenn. Code Ann. § 37-10-303. The Act outlines the requirements of a judicial bypass procedure, and authorizes the Tennessee Supreme Court to promulgate rules necessary to implement the bypass procedure for those minors who desire to obtain consent from a juvenile judge. See Tenn. Code Ann. § 37-10-304. The tort liability section that is the subject of this motion provides:

> Failure to obtain consent pursuant to the requirements of this part is prima facie evidence of failure to obtain informed consent and of interference with family relations in appropriate civil actions. The law of this state shall not be construed to preclude the award of exemplary damages in any appropriate civil action relevant to violations of this part. Nothing in this part shall be construed to limit the common law rights of parents.

Tenn. Code Ann. § 37-10-307.

It is not disputed that Defendant Fazel Manejwala performed an abortion upon Plaintiff Ashley Blackard without ensuring that she obtain consent to the procedure from a parent or from the juvenile court. However, at the time that the abortion was performed, the Parental Consent to Abortions for Minors Act was preliminary enjoined from enforcement by an Order of Judge Nixon of the Middle District of Tennessee.[1] In a previous Order of this Court, the Court held that:

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[1] The parties disputed whether Judge Nixon's injunction was in fact broad enough in scope to enjoin the juvenile judges of Tennessee from implementing an abortion bypass procedure. In the Order entered November 19, 1999, however, this Court found that the juvenile courts of Tennessee were in fact enjoined from implementing the judicial bypass procedure contemplated by the Consent Act. See Order entered November 19, 1999 at 8-12.

> It is clear to the Court, from the record now presented, that Judge Nixon's injunction effectively blocked enforcement of the judicial bypass procedure contemplated by the Consent Act, and that no such bypass procedure existed at the time of Ashley Blackard's abortion. For this reason, the Defendants cannot be charged with violating § 37-10-307 for failing to comply with Tennessee's abortion judicial bypass procedure. See, e.g., Eubanks v. Brown, 604 F.Supp. 141, 149 (W.D.Ky. 1984) (refusing to apply to defendants an abortion tort liability statute that had previously been found unconstitutional).

Plaintiff, however, argues that the opposite result is compelled by the reasoning contained in Justice Stevens' concurrence in Edgar v. Mite Corp., 457 U.S. 624. Edgar involved an Illinois statute imposing certain requirements (such as prior notification to the Secretary of State and the target company) prior to a stock tender offer intended as a "take-over" of the target company. The District Court entered a preliminary injunction against enforcement of the statute, finding a likelihood that the statute violates the Commerce Clause. Shortly thereafter, Mite Corp. published a tender offer for all outstanding shares of a publicly traded corporation. See Edgar, 457 U.S. at 626-630 (discussing the facts of the case). The District Court's injunction was appealed, and both the Court of Appeals and the Supreme Court upheld the findings of the District Court. In deciding the issue of mootness, both appellate courts addressed Mite's contention that the preliminary injunction was a complete defense to civil or criminal liability under the statute. The Supreme Court declined to decide the issue, however, holding that the issue was not ripe for consideration until the State of Illinois initiated a criminal action against Mite. Id. at 630.

Justice Stevens, however, in a well-reasoned concurrence, addressed the merits of the issue and found that the preliminary injunction was not a complete defense to criminal or civil prosecution. Justice Stevens found that "federal judges have no power to grant such blanket dispensation from the requirements of valid legislative enactments." Edgar, 457 U.S. at 649. He further wrote:

"[a]n individual who is imminently threatened with prosecution for conduct that he believes is constitutionally protected should not be forced to act at his peril. One purpose of the federal declaratory judgment statute is to permit such an individual to test the legality of a state statute before engaging in conduct that is prohibited by its terms." Id. at 651.

Apart from the fact that Justice Stevens views were not endorsed by a majority of the Court, his reasoning in Edgar is not controlling for two reasons. The first reasons is that the Illinois statute made the underlying activity (engaging in corporate take-overs) more difficult, but not impossible to perform without violating the statute. While the preliminary injunction was in effect, individuals who desired to tender a take-over offer without risking violation of the statute needed only to comply with the statute's requirements by registering with the appropriate state entities, giving the required notice, etc.

In the case *sub judice*, however, Judge Nixon's preliminary injunction made it not just difficult, but impossible for some minors (including Ashley Blackard) to receive abortions without violating the statute. As this Court previously found, the effect of Judge Nixon's Order was to prevent the implementation of the Tennessee judicial bypass procedure. Yet, the Consent Act required minors with unconsenting parents to obtain judicial consent prior to obtaining an abortion. This consent was simply impossible to obtain due to the absence of a bypass procedure. In such circumstances, minors with unconsenting parents were required to violate the statute in order to exercise their fundamental right to an abortion.

A second reason that the Edgar case is not analogous is that reliance upon a declaratory judgment action is not constitutionally sufficient recourse in the context of abortion. The right to an abortion is constitutionally protected. See Planned Parenthood of Southeastern Pennsylvania v. Casey, 505 U.S. 833, 869 (1992). States may impose certain restrictions upon the right to an abortion, but those restrictions may not impose an "undue burden" on a woman's right to receive an abortion. Id. at 874. States may constitutionally require minors to obtain a parent's consent to an abortion, but only if the state also provides a judicial bypass procedure by which the minor may obtain judicial consent to an abortion. See

Bellotti v. Baird, 443 U.S. 622, 643 (1979). To be constitutional, such a bypass procedure must "be completed with anonymity and sufficient expedition to provide an effective opportunity for an abortion to be obtained." Bellotti, 443 U.S. at 644. It cannot be reasonably disputed that requiring a minor to file a declaratory judgment action in federal court in order to obtain an abortion would not meet the constitutional requirements of expediency or confidentiality. See, e.g., Planned Parenthood of Southern Arizona v. Lawall, 180 F.3d 1022, 1027-1030 (9th Cir. 1999) (holding that a bypass scheme which did not contain specific deadlines within which the court must rule on the consent request is an "undue burden" on the right to an abortion).

Under Bellotti, the constitutionality of Tennessee's parental consent requirement hinged upon the actual implementation of a judicial bypass procedure. The mere theoretical provision of a bypass procedure in an enjoined statute is not sufficient. Even though Judge Nixon's preliminary injunction was ultimately overturned, the fact remains that his injunction had the practical effect of preventing the bypass procedure from becoming a reality during the time that the injunction was in effect. Until such time as the judicial bypass procedure was actually implemented, Tennessee could not constitutionally require minors to obtain parental consent to an abortion, and could not impose civil liability upon persons who failed to comply with the Consent Act.

The Court's refusal to instruct the jury according to § 37-10-307 was not in error. The Motion for a New Trial is DENIED.

ENTERED this 10th day of February, 2000.

/s/ Jon P. McCalla
JON P. McCALLA
UNITED STATES DISTRICT JUDGE

Appendix D
Blackard v. M.A.M.C.W., Order Denying Petition for Rehearing, En Banc (6th Cir. Oct. 29, 2001)

00-5326

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

MICHAEL BLACKARD AND SHARON BLACKARD, BOTH INDIVIDUALLY AND AS PARENTS, LEGAL GUARDIANS AND NEXT FRIENDS FOR ASHLEY BLACKARD, A MINOR,

Plaintiffs-Appellants,

v.

MEMPHIS AREA MEDICAL CENTER FOR WOMEN, INC., ET AL.,

Defendants-Appellee.

BEFORE: KENNEDY, SILER, and CLAY, Circuit Judges.

The court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges of this court, and no judge of this court having requested a vote on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. Accordingly, the petition is denied.

ENTERED BY ORDER OF THE COURT

/s/ Leonard Green

Leonard Green, Clerk

Appendix E
Judgment in a civil case.

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TENNESSEE
WESTERN DIVISION

MICHAEL BLACKARD, ET AL.,

Plaintiffs,

v.

MEMPHIS AREA MEDICAL CENTER FOR WOMEN, INC., ET AL.

Defendants.

No. 98-2996-M1/A

JUDGMENT IN A CIVIL CASE
(Filed December 6, 1999)

JURY VERDICT. This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

IT IS SO ORDERED AND ADJUDGED in accordance with the jury verdict rendered on December 3, 1999, judgment is hereby entered for the defendants, Memphis Area Medical Center for Women, Inc., DeAnna Greer, Jeanette Brown, and Fazal Manejwala, M.D., and against the plaintiffs, Michael Blackard and Sharon Blackard, Individually and as parents, legal guardians and next friends for Ashley Blackard, a minor.

ENTERED the 6th day of December, 1999

APPROVED:

/s/ Jon P. McCalla
Jon Phipps McCalla
UNITED STATES DISTRICT COURT

/s/ Robert R. DiTrolio
Robert R. DiTrolio
CLERK OF COURT

By: /s/ Betty A. Guy
Betty A. Guy
DEPUTY CLERK

Appendix F
Tenn. Const. Art. VI § 4

The Judges of the Circuit and Chancery Courts, and of other inferior Courts, shall be elected by the qualified voters of the district or circuit to which they are to be assigned. Every Judge of such Courts shall be thirty years of age, and shall before his election, have been a resident of the State for five years and of the circuit or district one year. His term of service shall be eight years.

Appendix G
Tenn. Code Ann. §16-3-803

(a) The administrative director of the courts shall work under the supervision and direction of the chief justice and shall, as the chief administrative officer of the state court system, assist the chief justice in the administration of the state court system to the end that litigation may be expedited and the administration of justice improved.

(b) The administrative director of the courts shall serve as secretary to the judicial council, shall perform those duties enumerated in §16-3-502, and shall attend to such other duties as may be assigned by the supreme court or chief justice thereof. As secretary to the judicial council, the administrative director of the courts shall provide staff and secretarial support for all functions of the judicial council.

(c)(1) Acting in accordance with procedures established pursuant to § 9-6-103, the administrative director of the courts shall annually prepare, approve, and submit a budget for the maintenance and operation of the state court system. When the budget for the maintenance and operation of the state court system is submitted to the department of finance and administration, the administrative director of the courts shall also submit copies of such budget to the speaker of the senate and the speaker of the house of representatives for referral and consideration by the appropriate standing committees of the general assembly.

(2) The administrative director of the courts shall administer the accounts of the state court system, including all accounts related to the state court system as may be designated by the comptroller of the treasury and the chief justice. The administrative director of the courts shall draw and approve all requisitions for the payment of public moneys appropriated for the maintenance and operation of the state court system, and shall audit claims and prepare vouchers for presentation to the department of finance and administration, including payroll warrants, expense warrants, and warrants cover-

ing the necessary cost of supplies, materials and other obligations by the various offices with respect to which the administrative director of the courts shall exercise fiscal responsibility.

(d) The administrative director of the courts shall, within budgetary limitations, provide the judges of the trial courts of record with minimum law libraries, the nature and extent of which shall be determined in every instance by the administrative director on the basis of need. All books furnished shall remain the property of the state, and shall be returned to the custody of the administrative director by each judge upon the retirement or expiration of the official duties of such judge.

(e) All functions performed by the administrative director of the courts which involve expenditures of state funds shall be subject to the same auditing procedures by the commissioner of finance and administration and the comptroller of the treasury as required in connection with the expenditure of all other state funds.

(f)(1) The administrative director of the courts shall, within the limit of appropriated funds, prepare for the supreme court's approval an annual judicial education plan providing for the orientation and continuing training and education of all elected or appointed judges of trial and appellate courts of record of this state.

(2) To the extent practicable, the annual judicial education plan shall provide that the orientation programs approved by the supreme court shall be made available to all newly elected or appointed judges of trial and appellate courts of record within one (1) year from the date of their initial appointment or election. The plan shall also provide, to the extent practicable, that all judges of trial and appellate courts of record whose terms exceed three (3) years shall, within two (2) years of the date of their initial election or appointment, be given the opportunity to attend judicial training programs approved by the supreme court.

(3) For the purpose of implementing the annual judicial education plan, the administrative director of the courts, with the approval of the chief justice, may apply for and expend grant funds from whatever source.

(4) The administrative director of the courts is authorized to recommend to the supreme court a plan whereby judges of trial and appellate courts of record who, on September 1, 1984, have not participated in training programs similar to those included in the annual judicial education plan, may be permitted to attend future orientation and training programs for judges made available through the annual plan.

(5) Nothing in this subsection nor in any annual judicial education plan prepared by the administrative director of the courts and approved by the supreme court shall be construed to require judges whose salaries and other related expenses are not paid by state government to participate in any training or orientation program provided for herein. With the agreement of appropriate units of local government to pay for the reasonable costs of such orientation and training programs, the administrative director of the courts may authorize judges whose salaries are paid by units of local government to participate in orientation or training programs made available in accordance with the approved annual plan.

(g) The administrative director of the courts shall continuously survey and study the operation of the state court system, the volume and condition of business in the courts of the state, whether of record or not, the procedures employed by those courts, and the quality and responsiveness of all of the courts with regard to the needs of civil litigants and the needs of the criminal justice system throughout the state. The administrative director of the courts shall also provide liaison and staff support to the judicial council with regard to the responsibilities of the judicial council in the above areas.

(h) The administrative director of the courts shall establish criteria, develop procedures and implement a Tennessee court information system (TnCIS). The system shall provide an integrated case management and accounting software system addressing the statutory responsibilities of the clerks of the general sessions, chancery, circuit, and juvenile courts. The system shall also provide state-wide reporting and data transfer capabilities for the administrative office

of the courts (AOC), department of human services, Tennessee bureau of investigation, department of safety and such other state agencies as may be determined by the AOC or as statutorily mandated.

(i) For the purposes of monitoring the operation of the state court system, reducing unnecessary delay, and assessing the responsiveness of the state court system to the needs of litigants, victims of crime, and the citizens of the state, the administrative director of the courts shall have the responsibility for annually collecting, compiling, analyzing, and publishing caseload statistics pertaining to the state court system. It is the responsibility of the administrative director of the courts to develop, define, update, and disseminate standard, uniform measures, definitions, and criteria for collecting statistics pertaining to the state court system. These standards and reporting requirements shall be used for uniform statistical data collection in all of the courts throughout the state as established by the rules of the supreme court.

(1) Prior to the November annual meeting of the Tennessee judicial council, the administrative director of the courts shall report to the chair of the judicial council, the chair of the judiciary committee of the senate, and the chair of the judiciary committee of the house of representatives the failure of any judge, district attorney general, district public defender, or court clerk to substantially comply with the reporting requirements.

(2) The office of the comptroller of the treasury, as a part of its annual county audit function, shall review for compliance with the reporting requirements.

(j) The administrative director of the courts shall prepare and distribute an annual report reflecting the operation of the courts of the state and highlighting those changes, innovations, or recommendations made or introduced to enhance the effectiveness of the courts.

(k) The administrative director of the courts shall conduct ongoing internal review, analysis, and planning for the future needs of the state court system. Such analysis shall be designed to devise ways

of simplifying court system procedure, expediting the transaction of court system business, and correcting weaknesses in the administration of justice.

(l) The administrative director of the courts shall:

(1) File a copy of the supreme court's policies and guidelines governing the reimbursement of expenses for judicial officers with the judiciary committees and the finance, ways and means committees of the senate and the house of representatives, the fiscal review committee, the comptroller of the treasury, and the commissioner of finance and administration; and

(2) Respond in a timely manner to any appropriate request by these committees or officials for information concerning reimbursements made pursuant to the policies and guidelines.

(m) The administrative director of the courts shall annually prepare and distribute to the judiciary committees of the senate and the house of representatives:

(1) A report detailing the expenditure of moneys in the civil legal representation of indigents fund; and

(2) A copy of any rules and policies adopted by the supreme court governing the expenditure and application of funds in the civil legal representation of indigents fund.

Appendix H
Tenn. Code Ann. §37-1-207

Any special juvenile court created by law shall have such title and style as the act creating such court may provide. Each juvenile court shall be a court of record, presided over by a judge who shall have such qualifications and salary as may be provided by law. Upon creation of a special juvenile court, a judge of the court shall be appointed as provided by law until the next general election and a person duly qualified is elected, and until a successor qualifies. The term of office shall be the same as other judges of the state. In the event the office of judge of the juvenile court becomes vacant by reason of death, resignation, retirement or other cause, before the expiration of the term of the judge, the vacancy shall be filled as provided by law.

Appendix I
Tenn. Code Ann. § 37-10-301 - 37-10-307

Tenn. Code § 37-10-301

(a) It is the intent of the general assembly in enacting this parental consent provision to further the important and compelling state interests of:

(1) Protecting minors against their own immaturity;

(2) Fostering the family structure and preserving it as a viable social unit; and

(3) Protecting the rights of parents to rear children who are members of their household.

(b) The general assembly finds as fact that:

(1) Immature minors often lack the ability to make fully informed choices that take into account of both immediate and long-range consequences;

(2) The medical, emotional, and psychological consequences of abortion are serious and can be lasting, particularly when the patient is immature;

(3) The capacity to become pregnant and the capacity for mature judgment concerning the wisdom of an abortion are not necessarily related;

(4) Parents ordinarily possess information essential to a physician's exercise of the physician's best medical judgment concerning the child; and

(5) Parents who are aware that their minor daughter has had an abortion may better ensure that their daughter receives adequate medical attention after the abortion.

(c) The general assembly further finds that parental consultation is usually desirable and in the best interests of the minor.

Tenn.Code § 37-10-302

As used in this part, unless the context otherwise requires:

(1) "Abortion" means the use of any instrument, medicine, drug, or any other substance or device with intent to terminate the pregnancy of a woman known to be pregnant with intent other than to increase the probability of a live birth, to preserve the life or health of the child after live birth, or to remove a dead fetus;

(2) "Emancipated minor" means any minor who is or has been married or has by court order or otherwise been freed from the care, custody and control of the minor's parents; and

(3) "Minor" means any person under eighteen (18) years of age.

Tenn.Code § 37-10-303

(a) No person shall perform an abortion on an unemancipated minor unless such person or such person's agent first obtains the written consent of one (1) parent or the legal guardian of the minor. The consent shall be signed.

(b) If neither a parent nor a legal guardian is available to the person performing the abortion or such person's agent, or the party from whom consent must be obtained pursuant to this section refuses to consent to the performance of an abortion, or the minor elects not to seek consent of the parent or legal guardian whose consent is required, then the minor may petition, on the minor's own behalf, or by next friend, the juvenile court of any county of this state for a waiver of the consent requirement of this section, pursuant to the procedures of s 37-10-304.

(c) If a criminal charge of incest is pending against a parent of such minor pursuant to § 39-15-302, the written consent of such parent, as provided for in subsection (a), is not required.

Tenn.Code § 37-10-304

(a) The requirements and procedures under this part are available and apply to minors, whether or not they are residents of this state.

(b) The court shall ensure that the minor's identity is kept anonymous. The minor shall be allowed to proceed under a pseudonym and shall be allowed to sign all documents, including the petition, by that pseudonym. In any proceedings involving the use of a pseudonym by the minor, the court shall require one (1) copy of the petition to be filed, under seal, that contains the true name of the minor. This copy of the petition shall be kept in a separate file, under seal, and shall not be available for inspection by anyone, except as provided in subsection (h).

(c)(1) The minor may participate in proceedings in the court on the minor's own behalf or through a next friend. The court shall advise the minor that the minor has a right to court-appointed counsel and shall provide the minor with such counsel upon the minor's request. The state shall further provide a court-appointed advocate in each judicial district to give information regarding the legal process to the minor and to coordinate with the court-appointed counsel. Such court-appointed advocates shall be compensated from funds appropriated for the reimbursement of court-appointed counsel.

(2) The department of children's services shall assign from existing staff at least one (1) court advocate in each judicial district to provide minors with information regarding requirements and procedures established by the provisions of this part, to assist in coordination of the activities of court-appointed counsel, to attend legal proceedings with the minor or the minor's next friend, and to make available written material concerning the provisions and applications of this part. The advocate shall be trained in the juvenile court procedures, in the procedures established by this part, and in counseling minors. The department shall provide a toll-free telephone number for minors to use in order to obtain the telephone number and address of a court advocate. The department shall further provide and distribute a written brochure or information sheet which summarizes the provisions and applications of this part and which

contains the toll-free telephone number as well as the names, addresses, and telephone numbers of the court advocates in each judicial district.

(d) Court proceedings under this section shall be given such precedence over other pending matters as is necessary to ensure that the court may reach a decision promptly, but in no case shall the court fail to rule within forty-eight (48) hours of the time of application; provided, that the forty-eight-hour limitation may be extended at the request of the minor. If, for any reason except the request of the minor, the court shall not have ruled within forty-eight (48) hours, the minor may deem the petition denied and immediately appeal the denial as provided in subsection (g). This provision is not deemed to restrict or forbid any other remedy now existing or hereafter enacted in such a situation.

(e) The consent requirement shall be waived if the court finds either that:

(1) The minor is mature and well-informed enough to make the abortion decision on the minor's own; or

(2) The performance of the abortion would be in the minor's best interests.

(f) A court that conducts proceedings under this section shall issue written and specific factual findings and legal conclusions supporting its decision and shall order that a confidential record of the evidence be maintained.

(g) An expedited, anonymous appeal shall be available to any minor. The appeal shall be de novo to the circuit court for the county in which the juvenile court is located. The appeal may be heard by the circuit court judge sitting in another county if necessary to meet the time limitations of this section. A notice of appeal shall be filed within twenty-four (24) hours of the decision by the juvenile court, but may be filed at any time, if the juvenile court has not ruled within forty-eight (48) hours of the filing of the petition. The record from the juvenile court must be received in the circuit court

and the appeal docketed there within five (5) calendar days of the filing of the notice of appeal. The appeal shall be heard and a decision rendered by the circuit court within five (5) calendar days from when the case is docketed in the circuit court. For the purpose of expediting the appellate procedure under this section, the time requirements of this section may be reduced by the Tennessee supreme court pursuant to its rulemaking authority in order to ensure an expedited appeal. The decision of the circuit court shall be appealable to the Tennessee supreme court in an anonymous and expedited manner as provided by the rules of the Tennessee supreme court. Jurisdiction under this section will remain in the Tennessee supreme court, notwithstanding the provision of any other statute or rule to the contrary.

(h) All court files, documents, exhibits, and all other records lodged in or subject to the control of the court shall be kept confidential and under seal. Statistical summaries of these proceedings may be compiled for such reporting purposes as the supreme court may by rule require or allow. However, no information shall be released for these purposes that would tend to identify any minor who has made use of this procedure.

(i) The supreme court is respectfully requested to promulgate any rules necessary to ensure that proceedings under this part are handled in an expeditious and anonymous manner, including any amendments to the Tennessee Rules of Appellate Procedure, Tennessee Rules of Civil Procedure and Tennessee Rules of Juvenile Procedure.

(j) No fees shall be required of any minor who makes use of the procedures provided by this section.

Tenn.Code § 37-10-305

The requirements of § 37-10-303 shall not apply when, in the best medical judgment of the physician based on the facts of the case before the physician, a medical emergency exists that so complicates the pregnancy as to require an immediate abortion.

Tenn.Code § 37-10-306

Any person who intentionally performs an abortion with knowledge that, or with reckless disregard as to whether the person upon whom the abortion is to be performed is an unemancipated minor, and who intentionally or knowingly fails to conform to any requirement of this part, commits a Class A misdemeanor.

Tenn.Code s 37-10-307

Failure to obtain consent pursuant to the requirements of this part is prima facie evidence of failure to obtain informed consent and of interference with family relations in appropriate civil actions. The law of this state shall not be construed to preclude the award of exemplary damages in any appropriate civil action relevant to violations of this part. Nothing in this part shall be construed to limit the common law rights of parents.

Appendix J
Affidavit of Cornelia Clark

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TENNESSEE
WESTERN DIVISION

MICHAEL BLACKARD and
SHARON BLACKARD, both
individually and as parents,
legal guardians and next friends
for ASHLEY BLACKARD, a minor,
Plaintiffs,

vs.

MEMPHIS AREA MEDICAL CENTER
FOR WOMEN, INC.,
JOHN DOE, and JANE DOE,
Defendants.

No. 98-2996 MI/A

AFFIDAVIT OF CORNELIA A. CLARK, DIRECTOR OF ADMINISTRATIVE OFFICE OF THE COURTS

STATE OF TENNESSEE
COUNTY OF DAVIDSON

COMES NOW your affiant, and does declare under oath as follows:

1. My name is Cornelia A. Clark. I am the Director of the Administrative Office of the Courts of Tennessee. I was appointed to the position by the Tennessee Supreme Court effective May 24, 1999.

2. I replaced Mr. Charles Ferrell as the Administrative Director of the Courts.

3. The primary duties of the Administrative Director of the Courts are enumerated in Tennessee Code Annotated § 16-3-801, et seq.

4. The Administrative Director of the Courts has no statutory or other authority to control the juvenile court judges or the circuit court judges of the State of Tennessee. The Administrative Director of the Courts has no power to order a juvenile judge or a circuit court judge to act, or to refrain from acting.

5. My duties as Administrative Director of the Administrative Office of the Courts are the same duties as were exercised by Mr. Charles Ferrell in 1998. The Administrative Director primarily manages the educational, planning, and financial aspects of the budget of the judicial department, and performs other administrative functions.

Further affiant saith not.

/s/ Cornelia A. Clark
Cornelia A. Clark

Sworn and subscribed before me this 3rd day of November, 1999.

/s/ Notary Public
Notary Public

My Commission Expires: 3-26-2003

Appendix K
Statement of Judge Kenneth Turner

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TENNESSEE
WESTERN DIVISION

MICHAEL BLACKARD and
SHARON BLACKARD, both
individually and as parents,
legal guardians and next friends
for ASHLEY BLACKARD, a minor,
Plaintiffs,

vs.

MEMPHIS AREA MEDICAL CENTER
FOR WOMEN, INC.,
JOHN DOE, and JANE DOE,
Defendants.

No. 98-2996 MI/A

STATEMENT OF JUDGE KENNETH A. TURNER

---

1. I am the duly elected Juvenile Court Judge of Shelby County, Tennessee. I was elected Juvenile Court Judge by the citizens of Shelby County, Tennessee.

2. I am aware that there is an office of the Judicial Department of the State of Tennessee entitled the Administrative Office of the Courts, which was created pursuant to the provisions of Tennessee Code Annotated Section 16-3-801 et seq. The Supreme Court of Tennessee appoints the Administrative Director of the courts. The position of Administrator of the Courts used to be held by Mr. Charles Ferrell, and is currently held by Ms. Connie Clark.

3. The Administrative Director of the Courts, acting alone, has no statutory or other supervisory authority or control over the Juvenile Court Judges of the State of Tennessee. The Administrative Director of the Courts has no power to order a Juvenile Court Judge to act or refrain from acting.

4. To my knowledge, the duties of the Administrative Director of the Administrative Office of the Court are ministerial in nature, and mainly concern managing the financial aspects of the Judicial Department, and other routine administrative functions. To my knowledge, the Director of the Administrative Office of the Courts does not establish judicial policy for the State of Tennessee.

/s/ Kenneth A. Turner
Kenneth A. Turner

This statement is respectfully subscribed this 4th day of November, 1999.

Appendix L
Planned Parenthood v. Sundquist, preliminary injunction (M.S. Tenn)

IN THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF TENNESSEE NASHVILLE DIVISION

MEMPHIS PLANNED PARENTHOOD, INC.

v.

DONALD SUNDQUIST, et al.

No. 3:89-0520
Judge Nixon

ORDER
(Entered on the Docket September 16, 1997)

Pending before the Court is Plaintiff Memphis Planned Parenthood's Motion for Clarification of the Preliminary Injunction Order, pursuant to Fed. R. Civ. P. 60(a), to correct an omission in the Order entered August 26, 1997 (Doc. No. 121). The Motion is hereby GRANTED, and the previous Order is amended to read:

> Pending before the Court is Plaintiff's Motion for Preliminary Injunction (Doc. No. 100), to which Defendant has filed a Memorandum in Opposition (Doc. No. 115). In accordance with the contemporaneously filed Memorandum, the Court hereby GRANTS the Plaintiff's Motion for Preliminary Injunction.
>
> It is FURTHER ORDERED that, pending further order of this Court, the defendants, their respective officers, agents, servants, employees, and attorneys, and all other persons in active concert or participation with them, are hereby

restrained and enjoined from enforcing Tenn. Code. Ann. §§ 37-10-301 through 37-10-307, the Parental Consent for Abortions by Minors Act.

This amended Order shall be effective nunc pro tunc August 26, 1997.

It is so ORDERED.

Entered this 15th day of September, 1997.

/s/ John T. Nixon
John T. Nixon, CHIEF JUDGE
UNITED STATES DISTRICT COURT

Supreme Court, U.S.
FILED
MAR 4 2002
OFFICE OF THE CLERK

(2)

No. 01-1128

In The

Supreme Court of the United States

MICHAEL BLACKARD, SHARON BLACKARD, and ASHLEY BLACKARD,

Petitioners,

v.

MEMPHIS AREA MEDICAL CENTER FOR WOMEN, INC., And DR. FAZAL MANEJWALA,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

BRIEF OF RESPONDENT DR. FAZAL MANEJWALA

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OR CALL COLLECT (402) 342-2831

30PP

QUESTIONS PRESENTED FOR REVIEW

Did the Sixth Circuit correctly decide that there was no judicial bypass procedure during the pendency of the preliminary injunction barring enforcement of Tennessee's Parental Consent for Abortions by Minors Act?

Did the Sixth Circuit correctly decide that, in the absence of a bypass procedure, Respondents were not liable for failing to obtain parental consent?

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STATEMENT OF THE CASE

Respondent Fazal Manejwala does not take issue with most of the facts set forth in the Statement of the Case found in the "Petition for Writ of Certiorari" filed by Michael Blackard, Sharon Blackard, and Ashley Blackard (hereinafter referred to as "Blackard Petition").

However, the Petitioners contend that a violation of the Parental Consent for Abortions by Minors Act (hereinafter referred to as the "Act") "not only incurs criminal penalties, but also creates civil remedies." Blackard Petition at 3. The Act does not *create* a new cause of action, but merely states that "[n]othing in this part shall be construed to limit the *common law* rights of parents." Tenn. Code Ann. §37-10-307 (emphasis added).

The Act requires that a minor seeking an abortion must have either the consent of a parent or a court order obtained through a judicial bypass procedure waiving the parental consent requirement. Tenn. Code Ann. §§37-10-303, -304. The Act further details the procedures that the state was required to follow in its bypass procedures, including procedures for maintaining confidentiality, ensuring expeditious resolution by a court hearing on a minor's petition, providing adequate assistance through state advocates and, where requested, providing counsel to assist minors. Tenn. Code Ann. §37-10-304; Tenn. Sup. Ct. R. 24. The Act further addresses certain evidentiary matters, including the fact that failure to follow its provisions will be prima facie evidence of a failure to obtain informed consent.

SUMMARY OF THE ARGUMENT

The Act cannot operate to mandate parental consent for a minor's abortion procedure unless there exists an operable judicial bypass procedure as an alternative to the parental consent requirement. Thus, the deciding question in this case is whether there was an operable judicial bypass procedure in place at the time that petitioner Ashley Blackard sought and received the abortion procedure. The district court and the Sixth Circuit correctly found that no judicial bypass procedure was in place due to the issuance of a preliminary injunction in the case of *Memphis Planned Parenthood v. Sundquist*, 2 F. Supp. 2d 997 (M.D. Tenn. 1997) (hereinafter referred to as the "Injunction"). As this question was essentially a question of fact and of state law, this case does not merit review by this Court.

ARGUMENT

I. Respondents cannot be held liable for failure to obtain parental consent in the absence of a judicial bypass procedure.

On September 15, 1997, in *Memphis Planned Parenthood v. Sundquist*, 2 F. Supp. 2d 997 (M.D. Tenn. 1997), the United States District Court for the Middle District of Tennessee issued an Injunction providing as follows:

> . . . that, pending further order of this court, the defendants, their respective officers, agents, servants, employees, and attorneys, and all other persons in active concert or participation with

> them, are hereby restrained and enjoined from enforcing Tenn. Code Ann. §§37-10-301 through 37-10-307, the Parental Consent for Abortions by Minors Act.

It is undisputed that the Injunction was in effect on March 26, 1998, when petitioner Ashley Blackard presented at the Memphis Area Medical Center for Women (hereinafter referred to as the "MAMCW") requesting an abortion and the procedure was performed by Respondent Fazal Manejwala. It also is undisputed that a judicial bypass procedure mandated by the Act and by prior holdings of the United States Supreme Court, which would have provided a means for a minor to obtain an abortion via court order, rather than parental consent, was *not* in place at the time of petitioner Ashley Blackard's abortion, due to the issuance of the Injunction.

Although the Sixth Circuit reversed the district court's decision in the case of *Memphis Planned Parenthood v. Sundquist*, 2 F. Supp. 2d 997 (M.D. Tenn. 1997), this ruling does not alter the fact that, at all times relevant hereto, the Injunction was in effect and enforcement of the Act was enjoined by a court that had the authority to issue such an injunction. It is well-settled law that an injunction, however erroneous, must be obeyed until set aside by the court granting it or by an appellate court. *See GTE Sylvania, Inc. v. Consumers Union of the United States, Inc.*, 445 U.S. 375 (1980); *Walker v. Birmingham*, 388 U.S. 306 (1967) (holding that questions regarding propriety of temporary injunction does not provide grounds for willfully violating injunction); *Howat v. Kansas*, 258 U.S. 181, 189-90 (1922); *Wolff Shoe Co. v. United States*, 141 F.3d 1116

(Fed. Cir. 1998); *Aladdin Industries, Inc. v. Associated Transport, Inc.*, 323 S.W.2d 222 (Tenn. Ct. App. 1958); *Segelke v. Segelke*, 584 S.W.2d 211 (Tenn. Ct. App. 1978). An injunction is asserted properly as a defense, even if vacated on appeal.

If a court order granting a preliminary injunction is to have meaning, it must mean that those who would benefit from its terms must be able to rely on it, and not subsequently be subject to penalty for doing so. Any contrary ruling would render the injunction a nullity and violate due process.

The Petitioners rely on the case of *Edgar v. Mite Corp.*, 457 U.S. 624, 627 (1982) (Stevens concurring), for the proposition that a preliminary injunction issued by a federal court does not grant blanket immunity for all persons to violate a duly enacted statute with impunity and that any person who violates said statute, albeit preliminary enjoined, runs the risk that such injunction could be reversed in the future and the person held civilly liable. *See* Blackard Petition at 6. The situation with which the Court was faced in *Edgar* is not analogous to the case at bar. In *Edgar*, Mite Corporation violated several provisions of the Illinois Business Takeover Act, which was in effect at the time of the violations. After committing the violations, Mite sought the issuance of an injunction to avoid prosecution by the Illinois Secretary of State.

In this case, the record is clear that the Act was not applicable at the time of the violations alleged by the Petitioners. Furthermore, even if the situation in *Edgar* were analogous, the portion of the case relied upon by

the Petitioners is dicta and is in the concurring, not the majority, opinion.

In its "Order Denying Motion for New Trial," the district court carefully consid:red the applicability of Justice Stevens' reasoning set forth in his concurring opinion in *Edgar v. Mite Corp.*, 457 U.S. 624 (1982). The district court held as follows:

> Plaintiff, however, argues that the opposite result is compelled by the reasoning contained in Justice Stevens' concurrence in *Edgar v. Mite Corp.*, 457 U.S. 624. *Edgar* involved an Illinois statute imposing certain requirements (such as prior notification to the Secretary of State and the target company) prior to a stock tender offer intended as a "take-over" of the target company. The District Court entered a preliminary injunction against the enforcement of the statute, finding a likelihood that the statute violates the Commerce Clause. Shortly thereafter, Mite Corp. published a tender offer for all outstanding shares of a publicly traded corporation. *See Edgar*, 457 U.S. at 616-630 (discussing the facts of the case). The District Court's injunction was appealed, and both the Court of Appeals and the Supreme Court upheld the findings of the District Court. In deciding the issue of mootness, both appellate courts address Mite's contention that the preliminary injunction was a complete defense to civil or criminal liability under the statute. The Supreme Court declined to decide the issue, however, holding that the issue was not ripe for consideration until the State of Illinois initiated a criminal action against Mite. *Id.* at 630.

Justice Stevens, however, in a well-reasoned concurrence, addressed the merits of the issue and found that the preliminary injunction was not a complete defense to criminal or civil prosecution. Justice Stevens found that "federal judges have no power to grant such blanket dispensation from the requirements of valid legislative enactments." *Edgar*, 457 U.S. at 649. He further wrote: "[a]n individual who is imminently threatened with prosecution for conduct that he believes is constitutionally protected should not be forced to act at his peril. One purpose of the federal declaratory judgment statute is to permit such an individual to test the legality of the state statute before engaging in conduct that is prohibited by its terms." *Id.* at 651.

Apart from the fact that Justice Stevens' views were not endorsed by a majority of the Court, his reasoning in *Edgar* is not controlling for two reasons. The first reasons [sic] is that the Illinois statute made the underlying activity (engaging in corporate take-overs) more difficult, but not impossible to perform without violating the statute. While the preliminary injunction was in effect, individuals who desired to tender a take-over offer without risking violation of the statute needed only to comply with the statute's requirements by registering with the appropriate state entities, giving notice, etc.

In the case *sub judice*, however, Judge Nixon's preliminary injunction made it not just difficult, but impossible for some minors (including Ashley Blackard) to receive abortions without violating the statute. As this Court previously found, the effect of Judge Nixon's order was to

prevent the implementation of the Tennessee judicial bypass procedure. Yet, the Consent Act required minors with unconsenting parents to obtain judicial consent prior to obtaining an abortion. This consent was simply impossible to obtain due to the absence of a bypass procedure. In such circumstances, minors with unconsenting parents were required to violate the statute in order to exercise their fundamental right to an abortion.

The second reason that the *Edgar* case is not analogous is that reliance upon a declaratory judgment action is not constitutionally sufficient recourse in the context of abortion. The right to an abortion is constitutionally protected. *See Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833, 869 (1992). States may impose certain restrictions upon the right to an abortion, but those restrictions may not impose an "undue burden" on a woman's right to receive an abortion. *Id.* at 874. States may constitutionally require minors to obtain a parent's consent to an abortion, but only if the state also provides a judicial bypass procedure by which the minor may obtain judicial consent to an abortion. *See Bellotti v. Baird*, 443 U.S. 622, 643 (1979). To be constitutional, such bypass procedure must "be completed with anonymity and sufficient expedition to provide an effective opportunity for an abortion to be obtained." *Bellotti*, 443 U.S. at 644. It cannot be reasonably disputed that requiring a minor to file a declaratory judgment action in federal court in order to obtain an abortion would not meet the constitutional requirements of expediency or confidentiality. *See, e.g., Planned Parenthood of Southern Arizona v. Lawall*, 180 F.3d 1022, 1027-1030 (9th

> Cir. 1999) (holding that a bypass scheme which did not contain specific deadlines within which the court must rule on the consent request is an "undue burden" on the right to an abortion).
>
> Under *Bellotti*, the constitutionality of Tennessee's parental consent requirement hinged upon the actual implementation of a judicial bypass procedure. The mere theoretical provision of a bypass procedure in an enjoined statute is not sufficient. Even though Judge Nixon's preliminary injunction was ultimately overturned, the fact remains that his injunction had the practical effect of preventing the bypass procedure from becoming a reality during the time that the injunction was in effect. Until such time as the judicial bypass procedure was actually implemented, Tennessee could not constitutionally require minors to obtain parental consent to an abortion, and could not impose civil liability upon persons who failed to comply with the Consent Act.

(R. 143, Order Denying Motion for New Trial, p. 3-6, JA at 682).

The Sixth Circuit also considered the Petitioners' argument that the Respondents, in performing the abortion procedure without parental consent, violated the Act to their own peril. The Sixth Circuit correctly rejected this argument, finding as follows:

> Such a result . . . would unduly burden a minor's right to an abortion. If there is no judicial bypass procedure in place, neither the minor nor her physician can legally be required to seek parental consent. As [Respondents] have noted, to allow this litigation to go forward

would be tantamount to fostering an unconstitutional regime.

Blackard, 262 F.3d at 580.

II. The Injunction precluded the Petitioners from proceeding on claims based on the Act because the Injunction prevented the implementation of a working judicial bypass procedure.

The Petitioners claim that "a Court may not enter an injunction against a person who has not been made a party to the case before it." *See* Blackard Petition at 11. The cases relied upon by the Petitioners in their attempt to nullify the effect of the Injunction are inapposite to the case at bar. Those cases do not address the rules of preclusion where the state has acted in the public interest, thus precluding conflicting private litigation by members of the public. For example, the Petitioners rely upon the case of *Chase National Bank v. Norwalk*, 290 U.S. 431 (1934), for the proposition that due process prohibits binding the Petitioners to a preliminary injunction issued in a prior case of which the Petitioners were not a party, and had no notice. *See* Blackard Petition at 11. But, *Chase National Bank v. Norwalk*, 290 U.S. 431 (1934), involved a dispute between a city and a bank over whether the city could enforce a judgment of ouster when the bank held a valid lien on the property. No dispute concerning the constitutionality of any statute existed and no state official was a party to the suit. Likewise, in the other cases relied upon by the Petitioners, including *Additive Controls and Measurement Systems, Inc. v. Flowdata, Inc.*, 96 F.3d 1390 (C.A. Fed (Tex. 1996)); *Scott v. Donald*, 165 U.S. 107 (1897); *Alemite Mfg. Corp. v. Staff*, 42 F.2d 832 (2d Cir.

1930); and *Regal Knitware Co. v. National Labor Relations Board*, 324 U.S. 9 (1945), the issues before the courts were whether individuals who were not parties to the lawsuit could be *punished* for violation of the injunction. The injunctions at issue in the aforementioned cases did not involve the enforcement of a statute, nor did the injunctions concern issues of whether individuals could seek civil damages based upon a statute when enforcement of the statute had been enjoined.

When a state is a party to litigation involving matters of general public interest, the state represents all citizens. 18 Moore's Federal Practice, §131.40[3][e], *see also Tacoma v. Taxpayers of Tacoma*, 357 U.S. 320, 340-41 (1958) (judgment effective not only against state, but against citizens who, "in their common public rights" were represented by the state); *Southwest Airlines v. Texas International Airlines*, 546 F.2d 84, 98 (5th Cir. 1977) ("proposition that governments may represent private interest in litigation, precluding relitigation, is clear"); *State of Michigan v. City of Allen Park*, 573 F. Supp. 1481, 1484 n. 5 (E.D. Mich. 1983) ("established law that when a governmental entity litigates a matter involving diffuse private rights . . . private citizens are bound by the results"). A state which defends a statute against a constitutional challenge is presumed to represent the interests of private parties who want the statute enforced. *See, e.g., Keith v. Dailey*, 764 F.2d 1265 (7th Cir. 1985); *see also Bradley v. Milliken*, 828 F.2d 1186, 1192 (6th Cir. 1987); *Athens Lumber Co. v. F.E.C.*, 690 F.2d 1364, 1366-67 (11th Cir. 1982). In *Memphis Planned Parenthood v. Sundquist*, 2 F. Supp. 2d 997 (M.D. Tenn. 1997), the

State of Tennessee – which appealed the district court's issuance of the Injunction – vigorously represented the interests of private parties who wanted the Act upheld and enforced. *Id.* at 997.

Injunctive and declaratory relief against the enforcement of a state law, predicated on constitutional grounds, automatically accrues to the benefit of others situated similarly to the plaintiff. *Craft v. Memphis Light, Gas & Water Division*, 534 F.2d 684, 686 (6th Cir. 1975) (affirming refusal to certify a class of plaintiffs whose constitutional rights were purportedly violated on the ground that class certification was unnecessary, as injunctive and declaratory relief, to the extent granted, would "accrue to the benefit of others similarly situated"); *Tolle v. Knoxville's Community Dev. Corp.*, 93 F.R.D. 376, 379 (E.D. Tenn. 1981); *Green v. Williams*, 94 F.R.D. 238, 242 (E.D. Tenn. 1980). In this case, the Respondents are similarly situated to the plaintiff in *Memphis Planned Parenthood*, as both provide abortion services in Tennessee. *See* Answer, ¶ 2, and *Memphis Planned Parenthood v. Sundquist*, 2 F. Supp. 2d at 1008. As such, the Injunction "automatically accrues" to the benefit of the Respondents.

The Injunction issued in *Memphis Planned Parenthood v. Sundquist*, 2 F. Supp. 2d 997 (M.D. Tenn. 1997), precluded enforcement of the Act. Contrary to their assertions, the Petitioners were not enjoined by the Injunction, as they were not required to refrain from any act, nor were they required to perform any act based upon the Injunction. Rather, the Injunction enjoined appropriate state officials from enforcing the Act. Due to the issuance of the Injunction, no judicial bypass procedure was implemented. Because no judicial bypass procedure was

implemented, Respondents could not be required to obtain parental consent from Petitioners Michael and Sharon Blackard prior to performing the abortion procedure on Petitioner Ashley Blackard. Moreover, Respondents could not be subjected to civil liability for failing to obtain parental consent.

If the district court had allowed the Petitioners to proceed on claims *based on the Act*, the district court would have been assuming the role of enforcing the Act for actions performed during a time when the Act had been enjoined preliminarily on the ground that it threatened the constitutional rights of citizens. *See Shelley v. Kramer*, 334 U.S. 1 (1948) (holding court enforcement of restrictive covenants based on race constituted impermissible state action); *cf. Regal Knitware Co. v. National Labor Relations Board*, 324 U.S. 9, 14 (1944) (state "may not nullify a decree by carrying out prohibited acts through aiders or abettors, although they were not parties to the original proceeding").

This Court has expressly held that the fear of damage awards can impose as much of a restriction on constitutional freedoms as a statute that expressly criminalizes behavior. In *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964), this Court explained:

> Presumably a person charged with violation of [a criminal] statute enjoys ordinary criminal-law safeguards such as the requirements of an indictment and of proof beyond a reasonable doubt. These safeguards are not available to a defendant in a civil action . . . Whether or not [one exercising his or her constitutional rights] can survive a succession of such judgment, the

> pall of fear and timidity imposed . . . is an atmosphere in which [constitutional] freedoms cannot survive.

Id. at 277-78.

In this case, had the district court allowed the Petitioners to pursue their claims pursuant to the Act, it would have imposed the "pall of fear and timidity" which would have required parental consent before minors could receive abortions. And, because the judicial bypass procedure was inoperative at the critical time due to the issuance of the Injunction, a decision to permit the Petitioners' claims to proceed under the Act would have created "an atmosphere in which constitutional freedoms cannot survive."

Such a result is impermissible when, as here, it results from a court's application of state civil law in a damages action between private parties, no less than when it results from the enactment of a statute. This Court has expressly held that a court may not, in the context of a damages action between private parties, apply state law in a manner that results in an impermissible abridgment of constitutional rights. For instance, in *New York Times v. Sullivan*, this Court considered an appeal from a damages award in a civil libel action against, *inter alia*, the New York Times Company. The complaint in that action alleged that the plaintiff had been libeled by statements in a full page advertisement carried in the *New York Times*. *New York Times*, 376 U.S. at 256. This Court reversed the award of damages, holding that the court's application of state civil law impermissibly abridged liberties guaranteed by the First and Fourteenth Amendments to the United States Constitution. *Id.*

at 277-80. This Court further held that the fear of such damage awards would fatally inhibit the exercise of constitutional rights. *Id.* at 277-78. Finally, this Court held that the Constitution applied even though the suit was between two private parties:

> Although this is a civil lawsuit between private parties, the Alabama courts have applied a state rule of law which petitioners claim to impose invalid restrictions on their constitutional freedoms of speech and press. It matters not that that law has been applied in a civil action and that it is common law only, though supplemented by statute. The test is not the form in which state power has been applied but, whatever the form, whether such power has in fact been exercised.

Id. at 265 (citations omitted). *See also Hustler Magazine v. Falwell*, 485 U.S. 46 (1988) (holding that First Amendment limits a court's application of state-law tort of intentional infliction of emotional distress).

Similarly, in *Barrows v. Jackson*, 346 U.S. 249 (1953), this Court considered whether the state court had properly sustained a demurrer to a complaint alleging breach of a restrictive covenant barring the use or occupation of specified property "by any person . . . not wholly of the white or Caucasian race." *Id.* at 251. Affirming the lower court's refusal to allow the action to proceed, this Court recognized that "[i]f a state court awards damages . . . a prospective seller of restricted land will either refuse to sell to non-Caucasians or else will require non-Caucasians to pay a higher price to meet the damages which the seller may incur." *Id.* at 254. Thus, the damages suit could not proceed because it would impermissibly effectuate an

unconstitutional regime, in which "[s]olely because of their race, non-Caucasians will be unable to . . . enjoy property on the same terms as Caucasians." *Id.* Given that such a regime could neither be effectuated directly by statute, nor in equity by act of judicial enforcement – a result foreclosed by this Court in *Shelley v. Kraemer*, 334 U.S. 1 (1948) – the *Barrows* Court held that it likewise could not be effectuated by compelling the defendant to respond in damages. *Barrows*, 346 U.S. at 258. *See also New York Times*, 376 U.S. at 277 ("What a State may not constitutionality bring about by means of a criminal statute is likewise beyond the reach of its civil law . . . ").

The Petitioners claim that the "Sixth Circuit's interpretation of privity and Rule 65(d) therefore violates due process, since it binds persons who are not parties before the Court." Blackard Petition at 15. In fact, the affidavits of C.R. "Bob" Martin, clerk of the Juvenile Court of Memphis and Shelby County, Tennessee, and Andrew J. Shookhoff, who was a Juvenile Court Judge for Davidson County, Tennessee, at the time of Petitioner Ashley Blackard's abortion, evidence that the Injunction did, in fact, prevent the Tennessee judges from implementing the judicial bypass procedures outlined in the Act. (R. 80, Affidavit, JA at 421). Specifically, Mr. Martin explained that during the time the Injunction was in effect, the Juvenile Court of Memphis and Shelby County, Tennessee did not implement or operate the judicial bypass procedure provided in the Act. (R. 80, Affidavit, p. 2, JA at 421). In his affidavit, Mr. Martin also stated as follows:

> As the Clerk of the Juvenile Court of Memphis, Shelby County, Tennessee, if a citizen had

> attempted to file a petition for a judicial bypass of the Parental Consent for Abortions by Minors Act under Tennessee Supreme Court Rule 24 in March 1998 or at any time when the injunction was in effect, I would have accepted the petition for filing. However, as an officer of the court, I would have obeyed the above referenced injunctive Order of the United States District Court for the Middle District of Tennessee and therefore would not have acted upon the Rule 24 judicial bypass procedure, nor would the Juvenile Court have acted on the petition.

(R. 80, Affidavit, p. 2-3, JA at 421).

The Petitioners now assert that the district court did not rely on the affidavits of Mr. Martin and Judge Shookhoff to make factual findings in its order granting relief, that the local rules of court precluded them from responding further, and that the Petitioners were not required to respond further, as they had responded to two previously filed motions for summary judgment. *See* Blackard Petition at 17-20. None of these arguments has any bearing on the issues which decided this case, as the Petitioners presented no evidence that contradicted the facts set forth in the affidavits of C.R. Martin and Andrew Shookhoff. (R. 99, Supplement Briefing as to Whether the Courts of the State of Tennessee were "in Active Concert and Participation with" Charles Ferrell at all Times Relevant to the Lawsuit, Ex. 2, JA at 478).

The district court, and the Sixth Circuit, properly found that the Tennessee courts were bound by the Injunction against Charles Ferrell, the Administrative Director of the Courts of Tennessee. In a well-reasoned holding, the district court found as follows:

To be in active concert or participation with a party, one need not have supervisory authority or control over the party, as Plaintiffs contend. "Rule 65(d) 'is derived from the common-law doctrine that a decree of injunction not only binds the parties defendant but also those identified with them in interest, in 'privity' with them, represented with them *or* subject to their control.' " *Golden State Bottling Co. v. NLRB*, 414 U.S. 168, 179 (1973) (emphasis added). *See also Regal Knitware v. NLRB*, 324 U.S. 9, 14 (1945). Plaintiff's argument assumes too narrow a view of the Court's equitable powers.

The Court also finds, on the basis of the record now presented, that the Administrative Director of the Courts of Tennessee acts "in active concert or participation with" the courts of the State of Tennessee, including the juvenile judges who were responsible for implementing the judicial bypass procedure under the Consent Act. By statute, the Director has a duty to "assist the Chief Justice [of the Supreme Court of Tennessee] in the administration of the state court system." Tenn. Code Ann. §16-3-803(a). The Director acts as secretary to the Judicial Council of the State of Tennessee. Tenn. Code Ann. §16-3-502(b). The Administrative Director has statutory duties to "establish criteria, develop procedures, and implement a statewide court system and case management information system." Tenn. Code Ann. §16-3-502(h). The Administrative Director annually collects, compiles, analyzes and publishes caseload statistics pertaining to the state court system. Tenn. Code Ann. §16-3-803(i). The Administrative Director is charged with conducting an "ongoing internal review, analysis, and planning for the future

> needs of the state court system" in order to "devise ways of simplifying court system procedure, expediting the transaction of court system business, and correcting weaknesses in the administration of justice." Tenn. Code Ann. §16-3-803(k). From this review of the Administrative Director's duties, it is clear to the Court that the Administrative Director is in a privity relationship with the courts of the State of Tennessee.
>
> *It is not disputed by the parties that Judge Nixon intended to enjoin Tennessee Courts from implementing the judicial bypass procedure called for by the Consent Act.* Defendants submit the Affidavit of Andrew J. Shookhoff, who was a Juvenile Court Judge for Davidson County, Tennessee, at the time Ashley Blackard's abortion occurred. Shookhoff stated that he presided over a number of abortion bypass proceedings pursuant to the Consent Act during the periods of time when the Act was not enjoined. Shookhoff further states that "[o]n more than one occasion during my tenure, the Act was enjoined by Judge Nixon of the United States District Court. When these injunctions were in effect against the Act, it was my understanding that the juvenile court did not have the legal authority to hear a minor's petitions for judicial waiver of the parental consent requirement." Shookhoff Affidavit at 2.

(R. 115, Order Granting Motion for Relief from Prior Order, p. 10, JA at 607) (emphasis added).

The Petitioners express concern that if the district court's rationale as set forth above is upheld, "public

officials' personal secretaries could be named sole defendants in injunctive relief suits, and bind their employers." *See* Blackard Petition at 15. The Petitioners suggest that the rationale utilized by the district court and upheld by the Sixth Circuit creates such a slippery slope as to transform the law of privity. *See* Blackard Petition at 15. In fact, the district court reviewed the relevant statutes setting forth the duties of the Administrative Director and, based upon the duties of the Administrative Director defined therein and by applying the law of privity, found that the Administrative Director acted "in active concert or participation with" the courts of the State of Tennessee, thus binding the courts to the Injunction. The Sixth Circuit upheld this finding. There is no slippery slope as suggested by the Petitioners.

The Petitioners argue that the district court analyzed the effect of the Injunction as a question of law, not of fact. In so arguing, the Petitioners stated as follows:

> If one examined the Tennessee Parental Consent statute, it entitles a minor to approach a court and seek judicial permission for an abortion without parental consent. *See* Tenn. Code Ann. §37-10-303(b) (App. 47a).
>
> At the time of Ashley Blackard's abortion, a minor had a legal statutory right, to obtain a judicial bypass —since it was contained in the statute. It makes no sense to enquire as a matter of fact whether a judicial bypass is available, since a bypass is a legal right, not a fact.

Blackard Petition at 16.

The Petitioners go on to suggest that the lower courts should not have considered the effect that the injunction

had on the enforcement of a judicial bypass procedure. Blackard Petition at 17.

Whether the district court and the Sixth Circuit analyzed the effect of the Planned Parenthood preliminary injunction upon enforcement of the Parental Consent Act as a question of law or a question of fact does not effect the correctness of the decisions of those courts. As a matter of law and of fact, there was no effective, operable judicial bypass procedure in place at the time that Petitioner Ashley Blackard obtained an abortion. As the Sixth Circuit stated, "a state statute requiring parental consent dies not pass constitutional muster merely because a judicial bypass procedure exists in theory or on paper." Blackard at 576.

III. Where a court issues an injunction which effectively prevents the implementation of a judicial bypass procedure, the Respondents cannot be held liable for not complying with the parental consent requirement or the judicial bypass procedure.

The Petitioners contend that one issue to be decided by this Court is "may the actions of a federal judge be attributed to a state, and make an admittedly constitutional state statute unconstitutional?" *See* Blackard Petition at i. In stating that "[t]he district court's rationale for refusing to allow the Blackards to rely upon the Parental Consent Statute was the fact that the preliminary injunction issued by U.S. District Judge John Nixon blocked enforcement of the judicial bypass procedure and rendered the Parental Consent Act unconstitutional . . . ", the Petitioners mischaracterize the district court's rationale.

See Blackard Petition at 22. In fact, the district court did not find that Judge Nixon's actions rendered the Act unconstitutional. Rather, the district court found that because Judge Nixon's issuance of the Injunction effectively blocked the enforcement of the judicial bypass procedure, Respondents could not be liable for failing to obtain parental consent. (R. 115, Order Granting Motion for Relief from Prior Order, p. 12, JA at 607).

It is well established that in the absence of a judicial bypass procedure, a State may not constitutionally enforce a scheme requiring parental consent for the abortion decisions of minors. *See, e.g., Planned Parenthood of Southern Pennsylvania v. Casey,* 505 U.S. 833, 899 (1992) ("[A] State may require a minor seeking an abortion to obtain the consent of a parent or guardian, provided that there is an adequate judicial bypass procedure."); *Akron v. Akron Center for Reproductive Health,* 462 U.S. 416, 440-42 (1983) (holding that a state statute which required parental consent without providing adequate judicial bypass was unconstitutional); *Bellotti v. Baird,* 443 U.S. 622 (1979).

IV. This case does not merit review by this Court.

The constitutional principles relied upon by the Sixth Circuit and the district court are entirely consistent with the precedent of this Court and with the decisions of other federal and state courts. *See* cases cited *infra.* Petitioners have not presented any compelling reason for this Court to exercise its discretionary jurisdiction over the Sixth Circuit's determination that no judicial bypass procedure existed at the time of Petitioner Ashley Blackard's abortion and that, therefore, the Petitioners could not rely

on the Act to impose liability on Respondents for failing to require parental consent.

The Petitioners contend that the courts "are in disarray as to the unresolved question posed by Justice Stevens in *Edgar v. Mite*; does a preliminary injunction grant blanket immunity to all persons who violate a statute, even if the injunction is later vacated on appeal?" In support of this contention, the Petitioners cite *Young Women's Christian Ass'n v. Kugler*, 463 F.2d 203 (3rd Cir. 1972). *See* Blackard Petition at 26. The Petitioners rely on *YWCA* for the proposition that Respondents Manejwala and MAMCW here should not be protected from the Act for violations of the Act committed during the pendency of the Injunction. *See* Blackard Petition at 26-27. The Petitioners note that the *YWCA* court held that in the absence of a class action, a declaratory judgment finding the New Jersey statute criminalizing the performance of abortions would not protect the physicians from criminal prosecution in the event that they violated the statute during the pendency of the appeal and were then unsuccessful on appeal. *See* Blackard Petition at 44.

YWCA is easily distinguishable from the case at bar. Most noteworthy is the fact that the physicians in *YWCA* sought, but did *not* receive, a preliminary injunction enjoining the enforcement of the New Jersey abortion statute. *YWCA* at 203. Thus, the request for injunctive relief having been denied, there was no bar to enforcement of the New Jersey abortion statute during the pendency of the declaratory judgment action.

Moreover, the case of *YWCA v. Kugler* has an extensive history which was not noted by the Petitioners. *See*

Young Women's Christian Ass'n of Princeton v. Kugler, 342 F. Supp. 1048 (D.N.J. 1972), *motion for stay denied*, 463 F.2d 203 (3rd Cir. 1973), *vacated and remanded*, 475 F.2d 1398 (3rd Cir. 1973), *judgment reinstated*, Civil No. 264-70 (D.N.J. July 24, 1973), *aff'd*, 493 F.2d 1402 (3rd Cir. 1974), *cert. den.*, 415 U.S. 989 (1974). The *YMCA* decision upon which the Petitioners rely was decided on June 14, 1972. Thereafter, on January 22, 1973, the Supreme Court declared that a woman's Constitutional right of privacy included the right to obtain an abortion during her first trimester. *Roe v. Wade*, 410 U.S. 113 (1973); *Doe v. Bolton*, 410 U.S. 179 (1973). The *YWCA* district court's final effective judgment entered on July 24, 1973, some six months after the decisions in *Roe* and *Doe*, declared the physicians free from criminal responsibility under the New Jersey abortion statute.

As the June 14, 1972 *YWCA* decision relied upon by the Petitioners was decided prior to the law being established in the cases of *Roe* and *Doe*, as well as the cases of *Bellotti v. Baird*, 443 U.S. 622 (1979) and *Planned Parenthood v. Casey*, 505 U.S. 833, 899 (1992), it has *no* applicability to the case at bar.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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No. 01-1128

In the Supreme Court of the United States

MICHAEL BLACKARD, SHARON BLACKARD, AND ASHLEY BLACKARD,
Petitioners,

v.

MEMPHIS AREA MEDICAL CENTER FOR WOMEN, INC. AND FAZEL MANEJWALA, M.D.,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

RESPONDENT MEMPHIS AREA MEDICAL CENTER FOR WOMEN, INC.'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Did the Sixth Circuit correctly decide that there was no judicial bypass procedure in operation at the time of the Petitioner's abortion, and that, in the absence of a bypass procedure, Respondents were not liable under Tennessee's Parental Consent for Abortions by Minors Act for failing to obtain parental consent under the Act?

PARTIES TO THE PROCEEDING AND CORPORATE DISCLOSURE STATEMENT

The caption of the case contains the names of all parties. Respondent Memphis Area Medical Center for Women, Inc. is not a corporation requiring a statement as to publicly held ownership interests pursuant to Rule 29.6 of the Rules of this Court.

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STATEMENT OF THE CASE

On March 26, 1998, Ashley Blackard, who was then seventeen years old, sought and obtained an abortion, performed by Respondent Fazel Manejwala, M.D., at Respondent Memphis Area Medical Center for Women (hereinafter "MAMCW"). After viewing a videotape explaining the abortion procedure, discussing the procedure with her counselor, and learning about the various risks and benefits of both pregnancy and abortion, Ashley Blackard consented to the procedure. She did not, however, obtain her parents' consent. (R. 123, Joint Pre-Trial Order). When her parents later learned about the abortion, they filed this suit against Respondents on behalf of themselves and their daughter. Ashley Blackard was added as a plaintiff in her own right when she became eighteen.

In their action, Petitioners alleged that by terminating Ashley's pregnancy without obtaining the consent of her parents, Respondents violated Tennessee's Parental Consent for Abortion by Minors Act (the "Act" or the "Parental Consent Act"), Tennessee Code Annotated §§ 37-10-301 to -307. (R. 1, Complaint). Relying on that alleged violation of the Act, Petitioners charged Respondents with battery, failure to obtain informed consent, and tortious interference with family relations. Id. At the time of the abortion, the Act was enjoined. As a result of the injunction, there existed no judicial bypass alternative to the Act's parental consent requirement when Ashley Blackard received her abortion. Petitioners' claims under the Act were ultimately dismissed because of the absence of a judicial bypass alternative.

Tennessee's Parental Consent Act and the Injunction against its enforcement

The parental consent act requires that a minor seeking an abortion must have either the consent of a parent or a court order obtained through a judicial bypass procedure waiving the requirement. Tenn. Code Ann. §§ 37-10-303, -304. The Act further details the procedures the State is required to follow in its bypass procedure, including procedures for maintaining confidentiality, ensuring expedition by a court hearing a minor's petition, providing adequate assistance through state advocates and, where requested, providing counsel to assist minors. Tenn. Code Ann. § 37-10-304; Tenn. Sup. Ct. R. 24. The Act further provides that the failure to obtain parental consent is prima facie evidence of "failure to obtain informed consent and of interference with family relations in appropriate civil actions." Tenn. Code Ann. § 37-10-307.

Significantly, at the time of Ashley Blackard's abortion, the Parental Consent Act was preliminarily enjoined. It had been enjoined by the Middle District of Tennessee in an action brought by Memphis Planned Parenthood against the Governor, the Attorney General, and the Director of the Administrative Office of the Courts of the State of Tennessee. Memphis Planned Parenthood v. Sundquist, 2 F. Supp. 2d 997 (M.D. Tenn. 1997)(hereinafter the "preliminary injunction" or "injunction").

The district court in Memphis Planned Parenthood enjoined the Act in its entirety after holding that the plaintiff in that action was likely to prevail in showing the Act was unconstitutional. In particular, the district court in Memphis Planned Parenthood concluded that the plaintiff was likely to establish that the bypass procedure itself posed undue and

unconstitutional burdens on minors seeking abortions in Tennessee. Memphis Planned Parenthood, 2 F. Supp. 2d at 1001-06. It further concluded that enforcement of the Act would irreparably harm minors seeking to exercise their right to have an abortion. Id. at 1007. The court issued a preliminary injunction that provided:

> It is Further ordered that, pending further order of this Court, the defendants, their respective officers, agents, servants, employees, and attorneys and all other persons in active concert or participation with them, are hereby restrained and enjoined from enforcing Tenn. Code Ann. §§ 37-10-301 through 37-10-307, the Parental Consent for Abortions by Minors Act. This amended order shall be effective nunc pro tunc August 26, 1997.

(Pet. App. 56a). The injunction remained in effect until at least May 5, 1999, when the Sixth Circuit reversed the district court's order preliminarily enjoining the Act. Memphis Planned Parenthood v. Sundquist, 175 F.3d 456 (6th Cir. 1999). The Sixth Circuit issued its mandate on August 13, 1999, following denial of the plaintiffs' Petition for Rehearing and Suggestion for Rehearing En Banc. Memphis Planned Parenthood, 184 F.3d 600 (6th Cir. 1999).

On remand to the district court, the Memphis Planned Parenthood parties entered into a joint temporary restraining order ("joint TRO") and a subsequent Agreed Order that continued to bar enforcement of the Act until the State of Tennessee could ensure that the bypass procedure required by the Act was actually operating in compliance with the terms of the Act, the Constitution, and the decision of the Sixth

Circuit reversing the preliminary injunction. (App. 7b and App. 9b). The joint TRO and Agreed Order were supported by evidence that the State was not prepared to implement the bypass in a manner consistent with the Act and the Constitution. That evidence included proof that many courts were not ready to receive minors' petitions for judicial bypasses and that the State did not have in place the advocates required by the Act to assist minors seeking bypasses. See Declarations of Jeanne Carr and Barbara Baldwin (App. 17b and App. 23b). See also Memphis Planned Parenthood, 175 F.3d at 462-63 (emphasizing role of advocates in holding the Act likely constitutional). Under the subsequent Agreed Order, that post-remand injunction remained in effect until, inter alia, counsel for defendants sent notice to all courts with juvenile jurisdiction and all courts charged with hearing the bypass petitions and appeals of denials advising them when the bypass would become effective and of the Act's requirements with regard to bypass proceedings. (App. 9b–15b, ¶¶ 2(a)-(k), ¶ 4). Moreover, under the Agreed Order, the injunction remained in effect until such time as the clerks of the juvenile and circuit courts certified to the Administrative Director of the Courts that they understood the Act's requirements. Id. at ¶¶ 2(k), 3, 4. The injunction was ultimately lifted on February 28, 2000.

Proceedings Below

In response to Petitioners' claims under the Parental Consent Act, Respondents argued that the Act could not be applied to Ashley Blackard's abortion because no judicial bypass alternative to the parental consent requirement existed as a result of the Memphis Planned Parenthood injunction. In support of this contention, Respondents submitted affidavits and declarations, as well as pleadings from the Memphis Planned Parenthood case, all demonstrating that there was no

judicial bypass procedure in effect at the time of the plaintiff Ashley Blackard's abortion procedure. (R. 78-9, Rule 60(b) Motion & Memorandum in Support).

For example, Respondents submitted the affidavit of the Court Clerk of the Juvenile Court of Memphis and Shelby County, C.R. "Bob" Martin, who stated that during the pendency of the preliminary injunction, the juvenile court did not operate the bypass procedure. (App. 2b, ¶ 2). Additionally, Andrew Shookhoff, a former juvenile court judge who was on the bench during the pendency of the preliminary injunction, submitted an affidavit affirming his understanding that during the pendency of the preliminary injunction he did not have the legal authority to hear and decide a petition for a judicial bypass. (App. 5b, ¶ 4).

Respondents also submitted copies of the joint TRO and Agreed Order from the Memphis Planned Parenthood litigation and their underlying declarations. (See App. 7b and App. 9b). As discussed above, those documents further establish that the bypass procedure was not in operation during the pendency of the preliminary injunction. Moreover, Respondents argued that because the juvenile courts of Tennessee are in active concert or participation with the Director of the Administrative Office of the Courts, which was one of the defendants in the Memphis Planned Parenthood case, the juvenile courts too were bound by the preliminary injunction and were therefore barred from operating the Act's judicial bypass procedure while the preliminary injunction was in effect. (R. 100, Defendants' Supplemental Memorandum).

In response to Respondents' evidence and arguments, Petitioners submitted affidavits showing that the Director of the Administrative Office of the Courts does not have

supervisory authority over the juvenile court judges. (Pet. App. 52a and 54a). As the district court emphasized, Petitioners' affidavits established that the Administrative Director does not have supervisory authority over the Tennessee courts, but the affidavits failed to establish that the Administrative Director is not *in privity with* the state courts that implement the bypass, including the juvenile courts. (Pet. App. 28a - 29a).

In its Order Granting Motion for Relief from a Prior Order of November 19, 1999, the district court found:

> It is clear to the Court, from the record now presented, that Judge Nixon's injunction effectively blocked enforcement of the judicial bypass procedure contemplated by the Consent Act, and that no such judicial bypass procedure existed at the time of Ashley Blackard's abortion. For this reason, the Defendants cannot be charged with violating [the Act] for failing to comply with Tennessee's abortion judicial bypass procedure.

(Pet. App. 29a - 30a) (emphasis added). The court thus concluded that in the absence of a judicial bypass procedure, it could not hold Respondents liable under the Act for failing to require parental consent for a minor's abortion. (Pet. App. 30a). Because the claims of Ashley Blackard's parents were based solely on the Act, the district court order had the effect of dismissing them from the suit.

Ashley Blackard proceeded to trial on her common law battery claim. The jury found that Ashley Blackard was

a "mature minor" under Tennessee law,[1] that she was capable of giving consent, and that she did in fact give informed consent to the procedure. The jury granted judgment for the defendants. (R. 135, Verdict). The plaintiffs subsequently filed a motion for new trial, which was denied (Pet. App. 31a).

Petitioners appealed the dismissal of their claims arising under the Act. The Sixth Circuit affirmed both the district court's finding that no bypass procedure was in effect during the pendency of the preliminary injunction, and its determination that the juvenile courts were bound by the preliminary injunction because they are in active concert or participation with the Director of the Administrative Office of the Courts. Blackard v. M.A.M.C.W., 262 F.3d 568, 576-77 (6th Cir. 2001); (Pet. App. 12a-13a). The Sixth Circuit also affirmed the district court's holding that, given the absence of an adequate judicial bypass procedure, Defendants could not be held liable for failing to require parental consent for Ashley Blackard's abortion. Id. at 578. (Pet. App. 16a-17a). Petitioners' request for a rehearing by the panel and a rehearing en banc was denied. (Pet. App. 36a).

SUMMARY OF THE ARGUMENT

State law cannot operate to mandate parental consent for a minor's abortion procedure unless there exists an adequate judicial bypass alternative to the parental consent requirement. That constitutional principle, which underlies

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[1] See Cardwell v. Bechtol, 754 S.W.2d 739 (Tenn. 1987) (holding that there is a rebuttable presumption that a minor between the ages of 14 and 17 is a "mature minor" capable of consenting to medical procedures).

the decisions of the district court and the Sixth Circuit in this case, is well settled by the precedent of this Court. See, e.g., Planned Parenthood v. Casey, 505 U.S. 833 (1992); Bellotti v. Baird, 443 U.S. 622 (1979). That principle has been uniformly adopted by the federal courts of appeal and the state courts of last resort considering the issue and is not disputed by Petitioners.

Although they try mightily to reframe the issues in this case, the Petitioners raise questions that miss the point of the decisions by the courts below. The Petitioners present no compelling reason for this Court to grant their writ of certiorari. The question on which this case hinges is the factual question of whether a judicial bypass procedure was in place when Ashley Blackard terminated her pregnancy. That is a question of fact and state law that was correctly decided by the courts below. It does not merit review by this Court.

ARGUMENT

I. The Petition for a Writ of Certiorari should be denied because the pivotal question at issue – whether a judicial bypass procedure was in place when Ashley Blackard terminated her pregnancy – is a question of fact and state law.

The pivotal question presented by this case is whether a judicial bypass procedure was in operation at the time that Ashley Blackard terminated her pregnancy. That question arises because of a well-established principle of constitutional law: In the absence of an adequate and operational judicial bypass procedure, the state may not require parental consent before a minor may obtain an abortion. See, e.g., Casey, 505 U.S. at 899 ("[A] State may require a minor seeking an

abortion to obtain the consent of a parent or guardian, *provided* that there is an adequate judicial bypass procedure.") (emphasis added); Ohio v. Akron Center for Reproductive Health, 497 U.S. 502, 510-19 (1990); Hodgson v. Minnesota, 497 U.S. 417, 461 (1990); Akron v. Akron Center for Reproductive Health, Inc., 462 U.S. 416, 440 (1983); Bellotti v. Baird, 443 U.S. 622 (1979).

Thus, in this case, if there existed no adequate judicial bypass procedure when Ashley Blackard terminated her pregnancy, Tennessee's Parental Consent Act could not operate to require parental consent for the abortion. See Blackard, 262 F.3d at 578, 580. More specifically, if there existed no adequate judicial bypass procedure at the relevant time, then Respondents cannot be held liable for refusing to require parental consent. Id.; (Pet. App. 29a – 30a, 35a); see also New York Times v. Sullivan, 376 U.S. 254 (1964) (holding that a court may not, in the context of a damages action between private parties, apply state law in a manner that results in the impermissible abridgment of constitutional rights); Barrows v. Jackson, 346 U.S. 249 (1953) (same).

Without question, this Court need not review this constitutional principle, which was followed by both the Sixth Circuit and the district court below. It is entirely consistent with the precedent of this Court. See cases cited supra. It is also entirely consistent with the decisions of the other United States courts of appeals and state courts of last resort. See, e.g., Planned Parenthood v. Lawall, 180 F.3d 1022, 1027-28 (holding that state law may not operate to require parental involvement in a minor's abortion decision in the absence of an adequate judicial bypass alternative), amended on other grounds on denial of rehearing, 193 F.3d 1042 (9th Cir. 1999); Causeway Med. Suite v. Ieyoub, 109 F.3d 1096, 1104-05 (5th Cir. 1997) (same); Pro-Choice Mississippi v. Fordice, 716 So. 2d 645, 658 (Miss. 1998) (same). Even

Petitioners concede that a minor is constitutionally entitled to a judicial alternative to a parental consent requirement for abortion. (Pet. for Writ of Cert., p. 16).

The only relevant question that remains, and the question on which this case turns, is whether in fact there existed an adequate and operational judicial bypass procedure when Ashley Blackard terminated her pregnancy. That is a question of fact and Tennessee law. It raises no federal law question of any consequence and, as such, the case does not merit review by this Court. See Sup. Ct. R. 10 ("A petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law."). It is also a question that the Sixth Circuit and the district court below correctly answered.

A. The uncontroverted evidence establishes that there was no judicial bypass procedure in operation when Ashley Blackard terminated her pregnancy.

The district court below clearly and correctly found – and the Sixth Circuit affirmed – that no bypass procedure existed when Ashley Blackard terminated her pregnancy:

> It is clear to the Court, from the record now presented, that Judge Nixon's injunction effectively blocked enforcement of the judicial bypass procedure contemplated by the Consent Act, and that no such judicial bypass procedure existed at the time of Ashley Blackard's abortion.

(Pet. App. 29a - 30a) (emphasis added); see also Blackard, 262 F.3d at 576-78.

The uncontroverted proof before the district court amply supports that finding. First, affidavits from court officers responsible for operating the judicial bypass procedure confirm that the bypass procedure in fact was not in effect during the pendency of the preliminary injunction. The clerk of the juvenile court, C.R. "Bob" Martin, swore in an affidavit:

> During the time that [the preliminary] injunction was in force and effect, and in compliance with this . . . injunction, the Juvenile Court of Memphis and Shelby County, Tennessee did not implement or operate the judicial bypass procedure provided by the Tennessee Parental Consent for Abortions by Minors Act.
>
> and
>
> To my knowledge, the Juvenile Court of Memphis, Shelby, County Tennessee has not heard any judicial bypass petitions since 1995.

(App. 2b – 3b, ¶¶ 2, 3). Likewise, a former juvenile court judge, Andrew J. Shookhoff, who was on the bench during the pendency of the preliminary injunction, provided an affidavit stating:

> Among my responsibilities during my tenure as a judge was presiding over petitions filed by minors seeking waiver of the requirement that they obtain a parent's consent for termination

> of pregnancy . . . . While on the bench, I presided over a number of bypass hearings . . . during those periods when the Act was not enjoined.
>
> and
>
> When [Judge Nixon's injunctions] were in effect against the Act, it was my understanding that the juvenile court did not have the legal authority to hear a minor's petition for judicial waiver of the parental consent requirement.

(App. 5b, ¶¶ 3, 4).

Petitioners make a series of arguments in an attempt to challenge the Martin Affidavit. (Petitioners did not challenge the Shookhoff Affidavit at the district court and cannot do so now for the first time). Petitioners state that they moved to strike the Martin Affidavit and that the district court "discounted the affidavit of C.R. Martin, as not being based on personal knowledge." Petitioners then cite a passage from the district court, incorrectly implying that the district court struck the Martin Affidavit. (Pet. for Writ of Cert., p. 18). Petitioners further argue that the district court did not rely on the Martin Affidavit in its Rule 60(b) order (Pet. App. 22a) because the court did not mention the Martin Affidavit, and that the district court could not have made findings of fact based on affidavits when "facts are in dispute." (Pet. for Writ of Cert., pp. 19-20).

Petitioners' account is misleading and misstates the record. The Martin Affidavit was filed in support of Respondents' joint motion for summary judgment under Rule 56 or for relief from a prior order under Rule 60(b). (R. 78-

80). Petitioners responded to the motion and moved to strike the Martin Affidavit on the basis that the Martin Affidavit was late-filed and because it contained a "hypothetical statement" about what a juvenile court judge "would have done" in light of a minor's petition. (R. 88, p. 5-6, 8-9). (Petitioners' motion to strike was based on Paragraph 4 of the Martin Affidavit). The district court considered both of Petitioners' arguments and found that Petitioners had not established that the Martin Affidavit should be stricken from the record. (R. 94, Order Denying Motion to Strike, p. 4). Although the district court agreed with Petitioners with respect to paragraph 4 of the Martin Affidavit, the court held that Martin could testify as to matters within his personal knowledge. Id. The district court, therefore, left intact paragraphs 2 and 3 of the Martin affidavit, which are quoted above.

Petitioners' statement that the district court did not rely upon or consider the Martin Affidavit in its Rule 60(b) Order is also inaccurate. In its Order, the district court stated that: "It is clear to the Court, *from the record now presented*, that Judge Nixon's injunction effectively blocked enforcement of the judicial bypass procedure contemplated by the Consent Act, and that no such judicial bypass procedure existed at the time of Ashley Blackard's abortion." (App. 29a - 30a) (emphasis added). The Martin Affidavit was part of the record at that time, as the district court had explicitly denied the Petitioners' earlier motion to strike the Martin Affidavit. The affidavit was, therefore, a part of the record that the district court considered in reaching its factual finding that no judicial bypass existed during the relevant time period.

Petitioners' argument that the district court could not have made findings of fact based on affidavits when "facts are in dispute" is also without merit. After the Martin Affidavit was filed, Petitioners filed the Affidavit of Cornelia Clark and

the statement of Kenneth Turner discussing the duties and the powers of the Administrative Director of the Courts. (See Pet. App. 52a, 54a). Neither affidavit stated that a bypass procedure was in place at the time of Ashley Blackard's abortion procedure, and Petitioners never produced any such evidence. Thus, whether there was a bypass procedure was not a "fact in dispute," and Petitioners' contention is groundless.

Additional evidence in the record further supports the conclusion of the district court and the Sixth Circuit that the bypass procedure was not in place at the time of Ashley Blackard's abortion. Perhaps most tellingly, after the preliminary injunction was reversed in Memphis Planned Parenthood, the State of Tennessee itself in effect admitted that the bypass was not in operation. It agreed to a joint TRO and Agreed Order that continued to bar enforcement of the Parental Consent Act until such time as the defendants, Tennessee Governor, Attorney General, and Director of the Administrative Office of the Courts of Tennessee, could ensure that the judicial bypass procedure was in compliance with the requirements of the Parental Consent Act, the decision of the Sixth Circuit decision reversing the issuance of the preliminary injunction, and the Constitution. The Agreed Order further provided that counsel for the defendants would inform the judges that the Parental Consent Act would not become effective until December 15, 1999. (App. 12b, ¶ 2(f)). Affidavits submitted in support of the joint TRO and Agreed Order provided that communication with various entities charged with implementing the Act, including the juvenile court system and the Tennessee Department of Children Services, indicated that the State of Tennessee was not prepared to implement the judicial bypass procedure under the Act as of August of 1999. Blackard, 262 F.3d at 578; (App. 17b and App. 23b). The joint TRO and Agreed

Order clearly support the conclusion of the district court and the Sixth Circuit that no adequate judicial bypass was in effect when Ashley Blackard obtained her abortion.

Rather than contest the facts establishing that no bypass procedure was in operation, Petitioners argue that whether there was a judicial bypass procedure is not a question of fact, but a question of law. (Pet. for Writ of Cert., p. 16). They contend that because the Act provided for a judicial bypass, a bypass was sufficiently in place, regardless of whether the courts were actually implementing the bypass specified in the Act. As the Sixth Circuit correctly recognized, this argument is simply wrong:

> A [parental consent requirement] does not pass constitutional muster merely because a judicial bypass procedure exists in theory or on paper. An adequate judicial bypass procedure must ensure that the issue of waiver of the parental consent requirement is resolved, including appeals, in a sufficiently anonymous and expeditious fashion to provide an effective opportunity for an abortion to be obtained.

Blackard, 262 F.3d at 576-77; see also Bellotti, 443 U.S. at 642-44. Although on paper the Act sets forth the guidelines for the operation of an adequate bypass procedure, it is uncontested that there was no bypass actually up and running at all times relevant to this case. It is this factual question on which the case turns, a question that is not appropriate for review by this Court.

B. The judicial bypass procedure could not operate during the pendency of the Injunction because the Tennessee Juvenile Courts are in active concert or participation with Tennessee's Administrative Director of the Courts as a factual matter and by virtue of Tennessee law.

It is not surprising that the juvenile courts did not operate the judicial bypass procedure during the pendency of the preliminary injunction, for they were bound by its terms. The injunction barred all defendants in that case[2] and their respective officers, agents, servants, employees, and attorneys, and all other persons in active concert or participation with them, from enforcing the Parental Consent Act. (Pet. App. 56a). As both the district court and the Sixth Circuit found, the juvenile courts are in active concert or participation with the Director of the Administrative Office of the Courts of Tennessee, one of the named defendants in the case, and as such they were bound by the injunction.

Federal Rule of Civil Procedure 65(d), which governs the scope of a preliminary injunction, provides that an injunction is binding upon "the parties to the action, their officers, agents, servants, employees, . . . and upon those persons in active concert or participation with them . . . ." Fed. R. Civ. P. 65(d). An injunction not only binds the defendant parties, but also those "identified with them in

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[2] The named defendants were Tennessee Governor Donald Sundquist, J. Knox Walkup, Attorney General of the State of Tennessee, and Charles Ferrell, Director of the Administrative Office of the Courts of Tennessee. (See Pet. App. 27a).

interest." See Chase National Bank v. City of Norwalk, 291 U.S. 431 (1934); In re Lennon, 166 U.S. 548 (1897). An injunction also binds those "in privity with or represented by" the defendants. Regal Knitwear Co. v. NLRB, 324 U.S. 9 (1945). Whether a person is in active concert or participation with a party depends on the "actual relationship between the person enjoined and the person thought to be bound by the injunction." Blackard, 262 F.3d at 574 (citing Regal Knitwear, 324 U.S. at 14).

The district court and the Sixth Circuit correctly concluded on the basis of the record and Tennessee law that the Administrative Director of the Courts ("Director") and his office are identified in interest with, and part of, the judicial system in Tennessee. Blackard, 262 F.3d at 574-76; (Pet. App. 27a – 29a). The Director has a duty to "assist the Chief Justice [of the Supreme Court of Tennessee] in the administration of the state court system." Tenn. Code. Ann. § 16-3-803(a); see also Tenn. Sup. Ct. R. 11(II)(b) (regarding the supervision of the judicial system). The Director is therefore intimately involved with the judiciary, and the "mutuality of interest" of the Director and the courts revolves around the administration of justice and uniform enforcement of law in the State of Tennessee. The Director is responsible for judicial education. Tenn. Code Ann. § 16-3-502; Tenn. Code Ann. § 38-12-109. In addition, the Director and his office are responsible for notification and communication within the Tennessee court system. Tenn. Sup. Ct. R. 17 and 22. The Director even determines the terms and conditions of appointment for some juvenile court referees. Tenn. Sup. Ct. R. 22. The Director also acts as the secretary to the Judicial Council of Tennessee. Tenn. Code Ann. § 16-3-502(b).

Furthermore, the Director has a statutory duty to "establish criteria, develop procedures, and implement a statewide court system and case management information system." Tenn. Code Ann. § 16-3-502(h). The Director has a statutory duty to "conduct ongoi internal review, analysis, and planning for future needs o the state court system." Tenn. Code Ann. § 16-3-502(k The Director and the Administrative Office of the Courts are responsible for the uniformity of procedure in Tennessee courts through the promulgation of uniform forms used throughout the Tennessee court system. Tenn. Sup. Ct. R. 13; Tenn. Code Ann. § 16-3-810; Tenn. Code Ann. § 40-11-150 (1999 Amendment) (regarding uniform conditional release orders in domestic violence cases).

The Administrative Director of the Courts is also the administrator of the budget of the Tennessee judiciary. With funding from the Administrator of the Courts enjoined, funding for the implementation of the judicial bypass procedures and requirements would be compromised. The Director and his office are directly involved with procedures in state courts to fulfill the needs of civil litigants. See Tenn. Code Ann. § 16-3-803(g) - (j).

Finally, the joint TRO and Agreed Order agreed to by the State after the reversal of the injunction in Memphis Planned Parenthood confirms the close relationship between the juvenile courts and the Director. The Agreed Order required the State Court Administrator to mail forms to the juvenile and circuit courts detailing the courts' responsibilities under the Act. (App. 14b, ¶ 2 (k)). It further provided that the Parental Consent Act would not become effective until the clerks of the respective courts return a signed form to the State Court Administrator acknowledging that they understand the requirements of the Act described by the Administrator.

Id. It is only reasonable to conclude from the joint TRO and Agreed Order that the Administrative Director of the Courts is intimately and actively linked to the courts administering the bypass procedure, and that the bypass procedure demanded by the Act was not in effect when the Act was enjoined.

In the face of this overwhelming support for the conclusion that the juvenile courts and the Administrative Director of the Courts are identified in interest, Petitioners argue that because the Director does not control the courts, the injunction could not bind the courts. (Pet. for Writ of Cert., p. 15) However, as the Sixth Circuit correctly held:

> [the Plaintiffs/Petitioners' definition of the required relationship] is overly narrow and does not comport with the law. It is not necessary that the enjoined party control the third party in order for the third party to be bound by the injunction. The third party is bound by an injunction if that party is identified with the named, enjoined party in interest, in 'privity' with it, represented by it, *or* subject to its control.

Blackard, 262 F.3d at 576 (emphasis in original) (citing Regal Knitwear, 324 U.S. at 14). It is clear that the Administrative Director of the Courts of Tennessee and the Tennessee Judiciary work in concert to accomplish the goal of administration of justice, including the enforcement of law, in the state of Tennessee, and that it is not necessary that the Director "control" the state courts.

It is worth noting that whether or not the courts were actually bound by the injunction, the district court and the

Sixth Circuit correctly found that there was in fact no judicial bypass in effect. Whether the juvenile court *should* have heeded the Injunction makes no difference when the fact is that the juvenile court *did* heed the Injunction and, as a result, did not implement the constitutionally mandated bypass procedure. (Pet. App. 29a – 30a).

C. Under well-settled authority of this Court, Respondents may not be held liable for failure to require parental consent in the absence of a judicial bypass procedure.

As discussed above, in the absence of a judicial bypass, a government may not constitutionally enforce a scheme requiring parental consent for the abortion decisions of minors. As both the Sixth Circuit and the district court recognized, because there was no judicial bypass available at the time of Ashley Blackard's abortion, state law may not require that she obtain parental consent before terminating her pregnancy. Blackard, 262 F.3d at 578, 580; (Pet. App. 29a – 30a, 35a). Such a result is impermissible when, as here, it would result from a court's application of state civil law in a damages action between private parties, as well as when it results from the enactment of a statute.

This Court has expressly held that a court may not, in the context of a damages action between private parties, apply state law in a manner that results in an impermissible abridgement of constitutional rights. For example, in New York Times v. Sullivan, 376 U.S. 254 (1964), the Supreme Court reversed a damages award in a civil libel action against the New York Times Company, holding that the court's application of state civil law impermissibly abridged liberties

guaranteed by the First and Fourteenth Amendments. Id. at 277-80. The Court held:

> Although this is a civil lawsuit between private parties, the Alabama courts have applied a state rule of law which petitioners claim to impose invalid restrictions on their constitutional freedoms of speech and press. It matters not that that law has been applied in a civil action and that it is common law only, though supplemented by statute. The test is not the form in which state power has been applied but, whatever the form, whether such power has in fact been exercised.

Id. at 265 (citations omitted). See also Hustler Magazine v. Falwell, 485 U.S. 46 (1988) (holding that the First Amendment limits a court's application of state-law tort of intentional infliction of emotional distress).

Similarly, in Barrows v. Jackson, 346 U.S. 249 (1953), the Supreme Court considered the question of whether the state court had properly sustained a demurrer to a complaint alleging breach of a restrictive covenant barring the use or occupation of specified property "by any person . . . not wholly of the white or Caucasian race." Id. at 251. Affirming the lower court's refusal to allow the action to proceed, the Supreme Court recognized that "[i]f a state court awards damages . . . a prospective seller of restricted land will either refuse to sell to non-Caucasians or else will require non-Caucasians to pay a higher price to meet the damages which the seller may incur." Id. at 254. Thus, the damages suit could not proceed because it would impermissibly effectuate an unconstitutional regime, in which "[s]olely because of their race, non-Caucasians will be unable to . . .

enjoy property on the same terms as Caucasians." Id. Given that such a regime could neither be effectuated directly by statute, nor in equity by act of judicial enforcement – a result foreclosed by the Supreme Court in Shelley v. Kramer, 334 U.S. 1 (1948) – the Barrows Court held that it likewise could not be effectuated by compelling the defendant to respond in damages. Barrows, 346 U.S. at 258. See also New York Times, 376 U.S. at 277 ("What a State may not constitutionally bring about by means of a criminal statute is likewise beyond the reach of its civil law . . . .").

In the present case, as the Sixth Circuit noted, had it permitted Petitioners' claims to proceed, it would have effectuated an unconstitutional regime which would require abortion providers to obtain parental consent in the absence of a bypass procedure. Blackard, 262 F.3d at 580. Such a regime would contravene the express dictates of established Supreme Court precedent. See, e.g., Casey, 505 U.S. at 899. Indeed, to allow Petitioners to prosecute their damages action against Respondents would sanction Respondents for preserving constitutional liberties by declining to require parental consent at a time when no judicial bypass was in place in Tennessee. This Court's authority prohibits that result.

II. The questions presented by Petitioners are misplaced and need not be addressed by this Court.

"Review on a writ of certiorari is not a matter of right, but of judicial discretion." Sup. Ct. R. 10. "A petition for a writ of certiorari will be granted only for compelling reasons." Id. Petitioners have not presented any compelling reason for this Court to exercise discretionary jurisdiction over the Sixth Circuit's determination that no judicial bypass procedure existed at the time of Ashley Blackard's abortion

and that, therefore, the Parental Consent Act could not be relied upon to impose liability on Respondents for failing to require parental consent.

Petitioners insist that the writ should be granted for three reasons: (1) Respondents violated the Act while it was enjoined at their own risk and cannot now claim immunity from suit; (2) the injunction could have no effect on the Petitioners and Respondents and could not bar the prosecution of the Petitioners' claim because neither Petitioners nor Respondents were parties to the suit that gave rise to the preliminary injunction; (3) the actions of a federal judge in issuing the preliminary injunction cannot render a state statute unconstitutional. These arguments are misplaced.

Like each of Petitioners' arguments, their first contention misses the point of this case. The critical reality here, and the reality that Petitioners cannot contest, is that no bypass procedure was in place during the pendency of the preliminary injunction. As a result, while the preliminary injunction was in effect, state law could not operate to require parental consent for a minor's abortion. By positing that Respondents cannot claim immunity from suit for their actions during the pendency of the preliminary injunction, Petitioners are effectively arguing that even though Ashley Blackard could not seek a judicial waiver of the Act's parental consent requirement, the Act should operate to mandate that Respondents obtain parental consent for her abortion. As the Sixth Circuit explained:

> Such a result, however, would unduly burden a minor's right to an abortion. If there is no judicial bypass procedure in place, neither the minor nor her physician can legally be required to seek parental consent. As

> [Respondents] have noted, to allow this litigation to go forward would be tantamount to fostering an unconstitutional regime.

Blackard, 262 F.3d at 580.

Petitioners' second argument misses the point for the same reason. Regardless of whether they or Respondents were parties in the case that gave rise to the preliminary injunction, there was no bypass in place during the pendency of that injunction. Accordingly, Respondents cannot be held liable for failing to obtain parental consent while the injunction was in effect.

Petitioners' final argument is equally misguided. It is well within the purview of a federal court to issue an injunction enjoining enforcement of a state statute. See, e.g., Doud v. Hodge, 350 U.S. 485, 487 (1956). In this instance, by virtue of such a preliminary injunction, there existed no judicial bypass procedure while the injunction was in effect. In the absence of an adequate judicial bypass procedure, neither state nor federal actors could constitutionally require parental consent for a minor seeking an abortion. That fundamental and well-settled principle resolves this case despite Petitioners' strenuous efforts to recast the questions presented.

Neither the Sixth Circuit's ruling nor the district court's decision below raises the questions presented by Petitioners. Those rulings are based on the finding that no judicial bypass procedure was in operation during the pendency of the preliminary injunction procedure. Petitioners never disputed this fact. The rulings further apply this Court's well-settled authority establishing that in the absence of the required bypass procedure, the government can not

require parental consent for a minor to receive an abortion. The rulings do not involve any unsettled federal law question and do not conflict with decisions in other Circuits.

CONCLUSION

For the foregoing reasons, Respondent Memphis Area Medical Center for Women, Inc. respectfully requests that this Honorable Court deny the Petition for Writ of Certiorari, and grant this Respondent such other relief to which it is entitled.

Respectfully submitted,

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APPENDIX 1

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TENNESSEE
WESTERN DIVISION

No. 98-2996 MI A

[Filed August 31, 1999]

MICHAEL BLACKARD,	)
SHARON BLACKARD, AND	)
ASHLEY BLACKARD,	)
Plaintiffs,	)
	)
v.	)
	)
MEMPHIS AREA MEDICAL	)
CENTER FOR WOMEN, INC.,	)
UT MEDICAL GROUP, INC.,	)
FAZEL MANEJWALA, M.D.	)
Defendants.	)
	)

AFFIDAVIT OF C.R. "BOB" MARTIN

STATE OF TENNESSEE
COUNTY OF SHELBY

After being duly sworn, the affiant makes oath as follows:

Affidavit of C.R. "Bob" Martin - 8/31/99

1. I am the Court Clerk of the Juvenile Court of Memphis and Shelby County, Tennessee, and I have held this position since 1988. I have knowledge of the facts hereafter set forth in this affidavit.

2. After the Tennessee legislature enacted the Parental Consent for Abortions by Minors Act, the case of *Memphis Planned Parenthood v. Donald Sundquist, Governor of the State of Tennessee, in his official capacity, J. Knox Walkup, Attorney General of the State of Tennessee, in his official capacity, and Charles Ferrell, Administrative Director of the Courts of Tennessee, in his official capacity*, was filed in the United States District Court for the Middle District of Tennessee. A Second Supplemental Complaint was filed in that case on September 5, 1997, a copy of which is attached hereto. In that case, the United States District Court on September 15, 1997 issued an Order which restrained and enjoined all defendants in that case and their respective officers, agents, servants, employees, and attorneys, and all other persons in active concert or participation with them, from enforcing Tenn. Code Ann. Sections 37-10-301 through 37-10-307 (the Parental Consent for Abortions by Minors Act). A copy of the Order of injunction was provided to me and is attached hereto. This Order remained in force and effect until it was overturned by the United States Court of Appeals for the Sixth Circuit on May 3, 1999. During the time that this Order of injunction was in force and effect, and in compliance with this Order of injunction, the Juvenile Court of Memphis and Shelby County, Tennessee did not implement or operate the judicial bypass procedure provided by the Tennessee Parental Consent for Abortions by Minors Act.

3. To my knowledge, the Juvenile Court of Memphis and Shelby County Tennessee has not heard any judicial bypass petitions since 1995.

4. As the Clerk of the Juvenile Court of Memphis, Shelby County, Tennessee, if a citizen had attempted to file a petition for a judicial bypass of the Parental Consent for Abortions by Minors Act under Tennessee Supreme Court Rule 24 in March 1998 or at any time when the injunction was in effect, I would have accepted the petition for filing. However, as an officer of the court I would have obeyed the above referenced injunctive Order of the United States District Court for the Middle District of Tennessee and therefore would not have acted upon the Rule 24 judicial bypass petition, nor would the Juvenile Court have acted on the petition.

/s/_____
C.R. "Bob" Martin
Court Clerk of the
Juvenile Court of Memphis
and Shelby County, Tennessee

SWORN TO AND SUBSCRIBED before the undersigned Notary Public this 27th day of August, 1999.

/s/_____
Notary Public

My Commission Expires: May 23, 2000

APPENDIX 2

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TENNESSEE
WESTERN DIVISION

No. 98-2996 MI A

[Filed November 8, 1999]

MICHAEL BLACKARD, and	)
SHARON BLACKARD, both,	)
individually and as parents,	)
Legal guardians and next friends,	)
For ASHLEY BLACKARD,	)
a minor,	)
Plaintiffs,	)
	)
v.	)
	)
MEMPHIS AREA MEDICAL	)
CENTER FOR WOMEN, INC.,	)
JOHN DOE and JANE DOE,	)
Defendants.	)
	)

DECLARATION OF ANDREW J. SHOOKHOFF

Andrew J. Shookhoff declares under penalty of perjury that the following is true and correct:

Declaration of Andrew J. Shookhoff

1. I am on the faculty of Vanderbilt University, where I hold appointments in public policy and law.

2. From September 1, 1990 to August 31, 1998, I served as the Juvenile Court Judge for Davidson County.

3. Among my responsibilities during my tenure as a judge was presiding over petitions filed by minors seeking waiver of the requirements that they obtain a parent's consent for termination of pregnancy. The requirement that the minor obtain parental consent, and that she be able to petition the juvenile court for a waiver of the consent requirement, was established by the Parental Consent for Abortions by Minors Act, Tenn. Code Ann §§37-10-301 to -307. In particular, the Act conferred upon minors who elected not to seek consent of a parent the right to petition the juvenile court for relief. While on the bench, I presided over a number of bypass hearings pursuant to this law during those periods when the Act was not enjoined.

4. During my time on the bench, I complied with the requirements of the law regarding the Parental Consent for Abortions by Minors Act. On more than one occasion during my tenure, the Act was enjoined by Judge Nixon of the United States District Court. When these injunctions were in effect against the Act, it was my understanding that the juvenile court did not have the legal authority to hear a minor's petitions for judicial waiver of the parental consent requirement.

/s/_____
Andrew J. Shookhoff

/s/_____
Notary Public

My Commission Expires
November 27, 1999

APPENDIX 3

IN THE UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION

Civil Action No. 3-89-0520

[Filed September 3, 1999]

MEMPHIS PLANNED PARENTHOOD ASSOCIATION, Plaintiff,	)
v.	)
DONALD SUNDQUIST, et al. Defendants.	)

BEFORE
Judge Nixon

AGREED TEMPORARY RESTRAINING ORDER

Upon the remand of this case from the United States Court of Appeals for the Sixth Circuit reversing this Court's issuance of a preliminary injunction, the plaintiff has filed a Motion for Limited Preliminary Injunction for the "limited time necessary for the State to ensure that the bypass procedure demanded by the Act, the Constitution, and the

Sixth Circuit opinion is in place." By agreement of the parties as evidenced by the signature of their counsel below, the defendants are RESTRAINED from enforcing Tennessee's Parental Consent Abortion Act, Tenn. Code Ann. §37-10-301, *et seq.* and Tennessee Supreme Court Rule 24. Fifteen days from the date of entry of this order, the parties shall either enter an agreed final order or the plaintiff shall request an immediate hearing as to whether this Court should grant the plaintiff's Motion for Injunctive Relief. This Agreed Temporary Restraining Order shall remain in effect until such time as the parties submit an agreed final order or this Court rules on the plaintiff's Motion for Injunctive Relief, but in any event the time of this Agreed Temporary Restraining Order shall not exceed thirty days from its entry.

It is so ordered.

/s/_____
John T. Nixon
Senior District Judge

Approved for Entry:

/s/_____
Louise Melling
Reproductive Freedom Project
American Civil Liberties Union Foundation
125 Broad Street
New York, New York 10004
Attorney for Plaintiff

/s/_____
Michael W. Catalano
Associate Solicitor General
Office of the Attorney General
425 5th Ave. North
Nashville, Tennessee 37243
Attorney for Defendants

APPENDIX 4

IN THE UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION

Civil Action No. 3-89-0520

[Filed October 13, 1999]

MEMPHIS PLANNED PARENTHOOD ASSOCIATION, Plaintiff,	)
v.	)
DONALD SUNDQUIST, et al. Defendants.	)

BEFORE
Judge Nixon

AGREED ORDER

On May 5, 1999, the United States Court of Appeals for the Sixth Circuit reversed the order of this Court granting the plaintiffs Motion for Preliminary Iniunction and then stated that "the cause is remanded to the district court for further proceedings consistent with this opinion." The plaintiff then timely filed a Petition for Rehearing and Suggestion for

Rehearing En Banc which the Sixth Circuit denied on August 13, 1999.

Since the remand of this case, the parties have agreed to enter an order, as evidenced by the signature of their counsel below; therefore, the following is ORDERED:

1. In light of the Sixth Circuit holding, the defendants may implement Tenn. Code Ann. §37-10-301, *et seq.* and Tennessee Supreme Court Rule 24 (collectively known as the Parental Consent Law) subject to the following provision:

The defendants are permanently enjoined from enforcing that provision of Tennessee Supreme Court Rule 24(4), limiting the venue for a minor pursuing a bypass petition to the county in which she resides or in which the abortion is sought. The Parental Consent Law's provision permitting the minor to petition any juvenile court in the state, Tenn. Code Ann. §37-10-303(b), shall govern.

2. The Parental Consent Law shall become effective when and not until the defendants accomplish the following in accordance with Parental Consent Law:

a. The Commissioner of the Department of Children's Services shall, in accordance with Tenn. Code Ann. §37-10-304(c)(2), designate from existing staff at least one court advocate in each judicial district of the State of Tennessee who shall provide minors with information regarding requirements and procedures established by the Parental Consent Law, assist in coordinating the activities of court-appointed counsel, attend legal proceedings with the

minor or the minor's next friend, and make available written materials concerning the provisions and applications of the Parental Consent Law.

b. The Commissioner of the Department of Children's Services shall provide all court advocates training in the juvenile court procedures, the procedures established by Tenn. Code Ann. §37-10-301 *et seq,* and in counseling minors as required by Tenn. Code Ann. §37-10-340(c)(2). The training shall also be made available to persons who staff the toll-free number and the juvenile court personnel who wish to attend.

c. The Commissioner of the Department of Children's Services shall provide and staff a toll-free telephone number for minors to use in order to obtain the telephone number and address of a court advocate most convenient to the minor in accordance with Tenn. Code Ann. §37-10-304(c)(2).

d. The Commissioner of the Department of Children's Services shall provide and distribute a written brochure or information sheet designed to assist minors pursuing a bypass that summarizes the provisions and applications of Tenn. Code Ann. §37-10-301 *et seq,* and Tennessee Supreme Court Rule 24, and includes the toll-free number as well as a list of the names, telephone numbers and addresses of the court advocates for each judicial district.

e. The Commissioner of the Department of Children's Services shall distribute such brochures or information sheets to the following: (1) juvenile court judges of this state and any judges with juvenile court jurisdiction in

this state; (2) juvenile court clerks of this state and any clerks with responsibilities for the juvenile court in this state; (3) circuit court judges of this state; (4) circuit court clerks of this state; (5) district attorneys of this state; (6) all ambulatory surgical treatment centers in state licensed specifically to perform abortions; (7) court advocates; and (8) agencies and persons that administer and staff the toll-free number.

f. Counsel for the defendants shall provide to the judges, clerks, officials and other interested entities identified in paragraph 2(e), Notice that the Parental Consent Law will become effective on December 15, 1999. Such Notice shall expressly and boldly advise recipients that the Parental Consent Law directs that minors have the opportunity to file for a bypass and directs that the procedure be expeditious and confidential. The Notice shall further state, in bold form, that the Parental Consent Law requires, among other elements, that all records be sealed; that the applicant shall be identified or referred to in all pleadings by initials except for one copy of the petition, which is to contain the applicant's true name and is to be filed under seal; that documents pertaining to the proceedings shall NOT be entered on court minutes but shall be maintained in a closed file that shall be conspicuously marked SEALED MATERIALS -- CONFIDENTIAL; that the hearing shall be closed to all but individuals specified in the Rule; and that the times for the court to act on filings are short and specified in the Rule. This Notice, like all others, shall also include the statements referenced in paragraphs 2(h) and 2(i).

g. Counsel for the defendants shall also provide the following to the judges, clerks, officials and other interested parties identified in paragraph 2(e): (1) A copy of

Tenn. Code Ann. §37-10-301 *et seq.*; (2) A copy of the Tennessee Supreme Court Rule 24; (3) A copy of the decision of the United States Court of Appeals for the Sixth Circuit dated May 5, 1999; (4) A Form Petition for Judicial Authorization of an Abortion Without Parental Consent based on Tennessee Supreme Court Rule 24; and (5) a copy of this Order.

h. All training, materials, notices, petitions, and other materials describing the Parental Consent Law and its provisions, including but not limited to those materials referenced above, shall expressly state that the Rule's provision limiting the minor's choice of venue to her home county or the county in which the abortion shall be performed, shall not be.enforced and that the minor may file a petition in any county in the state.

i. Similarly, any and all training, materials, notices, petitions, and other materials describing the Parental Consent Law and its provisions, including but not limited to the materials referenced above, shall state that the provision of the sample petition, contained in Rule 24, specifying that the minor is "of sound mind and has sufficient intellectual capacity to consent to an abortion," does not set forth a requirement of the petition. All materials shall further state that, the provision of the petition notwithstanding, the minor shall not be foreclosed from pursuing a bypass if she does not have that capacity.

j. The defendants shall also notify the juvenile court judges, judges with juvenile court jurisdiction, and circuit court judges in each judicial district that minors pursuing a bypass must be advised that they have a right to counsel and that minors who request counsel for their bypass

proceeding are entitled as a matter of law to counsel paid by the state and appointed by the court.

k. The State Court Administrator shall mail to the clerks of the courts with juvenile court jurisdiction a form pertaining to control and maintenance of their dockets as to petitions filed under Tenn. Code Ann. §37-10-304. Specifically, that form shall inform the clerks of the following: that a minor may file a judicial bypass petition in their court; that the minor shall be identified by initials only on all documents except one copy of the petition, which shall include her name; that all documents related to the judicial bypass shall be sealed; that no fee may be demanded of the minor; that the judicial bypass proceedings shall be maintained on a separate sealed docket; that the iudicial bypass proceedings may be identified on a docket open to public inspection only by a case number; that documents pertaining to the proceeding shall not be entered on the court minutes, but shall be maintained in a closed sealed file; that the hearing shall not be open; and that the proceedings must be conducted within set times prescribed in the Rule. This form shall contain a place for the signature of each clerk acknowledging receipt of the form to the effect that they have read and understand the foregoing requirements and shall require that the clerks return the signed form to the State Court Administrator before the Parental Consent Law can become effective. The State Court Administrator shall also mail to the circuit court clerks a form pertaining to control and maintenance of their dockets as to appeals filed under Tenn. Code Ann. §37-10-304. Specifically, that form shall inform the clerks of the following: that the minor may appeal a denial of a judicial bypass petition to their court; that the records must be sealed; that the hearing shall not be open; and

that the proceeding must be conducted within set times prescribed in the rule. This form shall contain a place for the signature of each clerk acknowledging receipt of the form to the effect that they have read and understand the foregoing requirements and shall require that the clerks return the signed form to the State Court Administrator before the Parental Consent Law can become effective. Following mailing the notice, the State Court Administrator shall file with the court the signed certification form from the clerks of each of the juvenile and circuit court's acknowledging receipt and understanding of the notice.

3. The implementation of the Parental Consent Act shall be enjoined, in any and all respects, until such time as the defendants certify to this Court that the requirements of paragraph two have been satisfied. The defendants shall accompany the certification with a copy of the list of advocates, the written brochure or information sheet referenced in paragraph 2(d), a copy of the notices referenced in paragraphs 2(f), 2(j) anti 2(k), the form petition, and the signed certifications referenced in paragraph 2(k).

4. The iniunction shall remain in effect until December 15, 1999, and no later, provided the requisite certification is filed in this Court no later than December 8,1999, and provided the Court does not extend or restore the injunction as provided in paragraph 5.

5. Should the certification not be filed, or in the event this Court concludes, on its own initiative or on review of any objections lodged by the plaintiff, that the certifications do not reflect adequate compliance with the requirements of paragraph two, it may extend or otherwise restore an

injunction against enforcement of the Parental Consent law, pending the defendants' satisfaction of any outstanding requirements.

/s/_____
John T. Nixon
Senior District Judge

Approved for Entry:

/s/_____
Louise Melling
American Civil Liberties Union Foundation
125 Broad Street
New York, New York 10004
Attorney for Plaintiff

/s/_____
Michael W. Catalano
425 5th Ave. North
Nashville, Tennessee 37243
Attorney for Defendants

APPENDIX 5

IN THE UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION

Civil Action No. 3-89-0520

[Dated August 24, 1999]

MEMPHIS PLANNED PARENTHOOD, INC. Plaintiff,	)
v.	)
DONALD SUNDQUIST, et al. Defendants.	)

DECLARATION OF JEANNE GRAY CARR

Jeanne Gray Carr states subject to the penalties of perjury:

1. I am the CEO/President of Memphis Regional Planned Parenthood, the plaintiff in this case. In order to prepare for implementation of the Tennessee Parental Consent for Abortions by Minors Act (the Act), I contacted or had a Planned Parenthood employee contact various persons who will be responsible for implementing the Act, both in the juvenile courts and in the Tennessee Department of Children's

Service (the Department) to see if they will be ready to receive minors seeking a waiver of the parental consent requirement. Based on these contacts, it is my opinion that the State of Tennessee is not prepared to implement the Act and that its implementation at this time, without further preparation on the part of state officials, will irreparably endanger the welfare of minors seeking abortions in Tennessee. I submit this declaration in support of limited injunctive relief, preventing enforcement of the Act, until such time as the advocates and other procedures necessary for the court bypass are in place.

2. The Act requires that minors have either parental consent or a court order if they are to obtain an abortion. Under the Act, minors who pursue a court order must file their petition in the juvenile court. To assist the minor with the process, the Act requires that the Department of Children's Services assign a court advocate from each judicial district to provide minors with information regarding the Act, to assist in coordination of the activities of court-appointed counsel, to attend legal proceedings with the minor or the next friend, and to make available to the minor written material concerning the provisions of the Act and the bypass procedure. The Act also requires that the advocate be trained in the provisions of the Act and in juvenile court procedures. In order to ascertain whether these critical processes are in place, I made the calls described here.

3. On Thursday, August 19, 1999, our manager of Clinic Education and Services, Laura Keefe, called the toll-free number that the Act requires the State to establish to assist minors seeking a judicial bypass and to provide the minors with the name, telephone number and address of the

court advocate for their judicial district. Ms. Keefe asked if a current list of advocates was available. She was told by the person answering the phone that no list was available as yet.

4. Also on Thursday, August 19, 1999, Laura Keefe and I had a meeting with Faye Howard, manager of the juvenile court for Shelby County (Memphis), and Jeanne Brown, a representative of the Department in Shelby County. Although Ms. Howard viewed the Shelby County juvenile court as ready to implement the Act, Ms. Brown stated that the Department has not updated its policies and procedures for court advocates to follow in assisting minors through the judicial bypass since 1995. (This is significant as new court rules were issued by the Tennessee Supreme Court in 1997.) Furthermore, as far as she knew, no advocates had been appointed as required by the Act, either in Shelby County or elsewhere; no training had been provided to advocates as required by the statute; and the statutorily required written information was not ready. When asked, Ms. Brown responded that she felt she and the Department needed more time to prepare to assist minors who seek the judicial bypass. This meeting is the latest in a series of contacts with the Department and the Shelby County Juvenile Court I began making in May (when the Sixth Circuit first ruled in this case) in an effort to ensure that a viable bypass option was available, at least in Memphis.

5. On Friday, August 20, 1999, I called the juvenile court in Fayette County, a county from which our clinic draws patients and which is contiguous to Memphis. I spoke to Jan Doyle, a clerk in the juvenile court who works for juvenile Judge Weber McCraw. Ms Doyle was unaware of the parental consent law or of any decision from the Sixth

Circuit that might put the law into effect. She said that the Fayette County juvenile court was not ready to implement the law and would appreciate more time to get ready. She asked me to fax her a copy ofthe law.

6. Also on Friday, August 20, 1999, I called the juvenile court in Tipton County, a county contiguous to Memphis, from which our clinic draws patients. I spoke to Darryl Rozell, a youth services and juvenile court officer who is responsible for scheduling cases in juvenile court. He said he knew that the parental consent law existed but he was unaware of any recent changes in the court rules or of the decision of the Sixth Circuit that will put the law back into effect. When I asked him if the court was ready to implement the law, he said "obviously not" and would appreciate time to get ready. He asked me to fax a copy of the law to him.

7. Also on Friday, August 20, 1999, I called the juvenile court in Dyer County in West Tennessee because that county contains the city of Dyersberg, another population center from which we draw patients. I spoke to Sandy Sanders, the manager of the juvenile court. She was unaware of the Act or of any decision of the Sixth Circuit that will put the Act into effect and stated that she was not ready to implement it. She asked me to fax a copy of the law to her.

8. Also on Friday, August 20, 1999, I called the juvenile court in Madison County, which contains the City of Jackson, another population center from which we draw patients. I left a message for the juvenile court and stated the purpose of my call was to find out about the court's plan to implement the parental consent law. My phone call was not returned.

9. Based on the forgoing conversations, I believe that many juvenile courts in the part of the state from which I draw clients, with the exception of Memphis, are ill-prepared to implement the judicial bypass system, making the existence of trained court advocates to assist minors particularly important. This lack of court readiness, together with the failure of the State to appoint or train court advocates, will harm patients. The task of pursuing a bypass is formidable, Minors struggling to pursue a bypass cannot be in the position of calling a court that is unaware of the law and unable to assist them. Neither can they shoulder the burden of fighting alone for access. In addition to help in navigating and explaining what may be a daunting process for young women, the advocate will play an important role in helping the minor access counsel and set up appointments with counsel and the court. This is an especially critical function for minors who, in seeking to protect their confidentiality, may be unable to readily make and receive phone calls. If the minor needs to meet the Act's 24-hour appeal deadline, the assistance of the advocate may be even more critical in ensuring she learns orthe court's negative decision and can communicate with her lawyer in a timely fashion.

10. For all these reasons, absent greater readiness on the part of the courts and the advocates, minors may be subject to delays and confusion in attempting to access the judicial bypass and some will be unable to obtain a bypass, and thus an abortion, at all.

I declare subject to the penalty of perjury that the above is true and correct.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

/s/_____
Jeanne Gray Carr

Dated: August 24, 1999

APPENDIX 6

IN THE UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION

Civil Action No. 3-89-0520

[Dated August 24, 1999]

MEMPHIS PLANNED PARENTHOOD, INC. Plaintiff,	)
v.	)
DONALD SUNDQUIST, et al. Defendants.	)

DECLARATION OF BARBARA BALDWIN

Barbara Baldwin declares subject to the penalties of perjury:

1. I am Executive Director of Planned Parenthood of Middle Tennessee, which operates a facility that provides abortion services in Nashville. Because minors seeking abortions at our facility will be subject to the Parental Consent for Abortions by Minors Act (the Act), I made a series of calls to determine what procedures are in place to assist a minor through the judicial bypass. It is my impression, based

on these contacts with state officials and court personnel, that the State of Tennessee is not prepared to implement the judicial bypass. I, therefore, fear that the Act will cause irreparable injury to minors seeking abortions in Tennessee. I am therefore submitting this declaration in support of the plaintiff's application for limited injunctive relief until such time as Tennessee has in place a viable bypass option.

2. The Act requires that minors have either parental consent or a court order if they are to obtain an abortion. Under the Act, minors who pursue a court order must file their petition in the juvenile court. To assist the minor with the process, the Act requires that the Department of Children's Services (the Department), assign a court advocate from each judicial district to provide minors with information regarding the Act, to assist in coordination of the activities of court-appointed counsel, to attend legal proceedings with the minor or the next friend and to make available to minors written material concerning the provisions of the Act and the bypass procedure. The Act also requires that the advocate be trained in the provisions of the Act and in juvenile court procedures. If I am to send my patients to court, which I must now do, I am concerned that these processes be in place. Since the Sixth Circuit decision, I have placed periodic calls to see if the state has been preparing for implementation. Since the court denied the petition for rehearing and implementation became imminent, my concern for my patients and thus my calls have intensified.

3. I first attempted to determine if the Department had in place the system of trained court advocates that the statute requires. On Thursday, August 19, 1999, I spoke with Marilyn Hayes, Assistant Commissioner of the Department.

Ms. Hayes told me there is no updated list of advocates available and the existing list was last revised in 1997, since which time personnel have changed. She also stated that no new advocates had been appointed, that there were no plans for training advocates, and that the last training occurred in 1997. She also stated that the written materials that the Act requires that the court advocates make available to minors had not been updated since 1997.

4. On Friday, August 20, 1999, I called the toll-free number that the Act requires the State to maintain for minors seeking help with the judicial bypass and through which they can obtain the telephone number and address of a court advocate. The person who answered the phone told me that she had no updated list of advocates; the only list she had is dated 1997. On Tuesday, August 24, 1999, I called Karen Spencer, the person who oversees operation of the toll-free number at Crittenton Services (the agency that runs the toll-free number for the state). She confirmed that she had no list of advocates more recent than 1997, She also informed me that she believed that minors would have to go to their counties of residence to obtain a bypass. I informed her that according to the decision of the Sixth Circuit minors may pursue a bypass in any county in the State. This conversation leads me to conclude that persons answering the toll-free number need training on the requirements of the Act.

5. On Thursday, August 19, 1999, I called the Rutherford County juvenile court. Rutherford County is contiguous to Nashville and an area from which we draw our patients. I spoke to Kenna Campbell, the person who answered the phone when I asked for the juvenile court. She had no information about the Act or the judicial bypass. She

stated that she had no idea how to help me and that the court had no process for handling minors seeking the judicial bypass in Rutherford County.

6. On Friday, August 20, 1999, I called the juvenile court in Sumner County, also a populous county contiguous to Nashville from which we draw our clients. I spoke to a woman named Cheryl, who identified herself as Judge Barry's secretary. She stated she had no knowledge of any process for handling minors who might come to the court for the judicial bypass. She consulted one of the judges who instructed her to say that no one would be able to help me until next week. On Monday, August 23, 1999, Cheryl called me back and said she had checked with the judge and he said he was unaware that the statute was or would soon be in effect or of the 1997 court rules, and once he got more information he would put a process in place to handle bypass petitions.

7. On Friday, August 20, 1999, I called the Williamson County courthouse. Williamson County is another county contiguous to Nashville. I asked to speak to the juvenile court and I was put through to a person named Samantha Curtis. Ms. Curtis knew nothing about the parental consent law or the judicial bypass and said she would check with the judges and would get back to me next week. To date I have not received such a call.

8. In contrast, on Monday, August 23, 1999, I spoke to Larry Gibney, the court administrator in Knox County, who stated he knew about the Act, and was prepared to assist minors who request judicial bypass. He also stated that a court advocate was in place for Knox County.

9. On Friday, August 20, 1999, I called the juvenile court in Hamilton County (Chattanooga). I told the person who answered the phone that my purpose was to find out about implementation of the judicial bypass. I was told that Mr. Albright, the court administrator, would call me back. To date, I have not received a return call.

10. It is my understanding, based on conversations with Nashville attorneys, that the juvenile court in Davidson County (Nashville) is prepared to implement the judicial bypass. I do not, however, believe an advocate has been appointed in Davidson County. On Tuesday, August 24, 1999, I spoke to Brenda West, a supervisor at the Department in Nashville who told me that the person listed on the 1997 list of advocates no longer works for the Department. She was unable to supply the name of a new advocate.

11. Based on the above conversations, it is my impression that the State of Tennessee is at present ill-prepared to put the judicial bypass into effect. Juvenile courts in populous counties have no idea that the law was scheduled to take or had taken effect and have in place no procedures to assist minors who seek a judicial bypass. This makes the role of the statutorily-required court advocates all the more critical. The advocates are particularly critical in helping the minor contact her attorney or the court, as young pregnant women seeking to protect their confidentiality have difficulty making or receiving phone calls. Help with contacting her lawyer and the court will be particularly important if the minor needs to meet the twenty-four hour appeal deadline, which starts to run the moment the juvenile court denies her petition. The advocate can also assist the minor to navigate a complex judicial bypass system.

12. Despite minors' dire need and the mandate of the Act, the State has not published an updated list of advocates, appointed new advocates, or provided them with training. Nor have the courts been apprised of the Act's having taken effect. For all these reasons I believe that minors will be irreparably injured by the Act.

I declare under penalty of perjury that the above is true and correct.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

/s/_____
Barbara Baldwin

Dated: August 24, 1999

Supreme Court, U.S.
FILED
APR 16 2002
OFFICE OF THE CLERK

(4)

No. 01-1128

IN THE
Supreme Court of the United States

MICHAEL BLACKARD, SHARON BLACKARD,
AND
ASHLEY BLACKARD,
Petitioners,

V.

MEMPHIS AREA MEDICAL
CENTER FOR WOMEN, INC.
AND DR. FAZAL MANEJAWALA,
Respondents.

On Petition for Writ of Certiorari
To the United States Court of Appeals
For the Sixth Circuit

REPLY TO BRIEFS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

ROBERT L. HUTTON, ESQUIRE
Counsel of Record

JOHN W. PIEROTTI, ESQUIRE
PAUL B. BILLINGS, JR., ESQUIRE

GLANKLER BROWN, PLLC
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(901) 525-1322

12pp

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I. Respondents' argument that Petitioners' cause of action for violation of Tennessee's Parental Consent Act was properly foreclosed by the failure of Tennessee to implement and administer an adequate judicial bypass alternative to the parental consent requirement misconstrues the Court's opinion in *Bellotti*, and adds an "implementation and administration" component not discussed in *Bellotti* or any of the Court's other parental consent abortion decisions 1

II. The District Court held that the Parental Consent Act creates a civil cause of action. . . . 5

III. Respondents' argument that the State of Tennessee represented the Petitioners' interests was rejected by both the District Court and the Court of Appeals, and is not properly before this Court. 6

CONCLUSION 9

TABLE OF AUTHORITIES

CASES:

Bellotti v. Baird, 443 U.S. 622 (1979) 1, 3, 4
Lambert v. Wicklund, 520 U.S. 292 (1997) 3

Tennessee Code Annotated:

Tenn. Code Ann. §37-10-307 5

Court Rules:

Supreme Court Rule 14.1(a) 6, 8

I. Respondents' argument that Petitioners' cause of action for violation of Tennessee's Parental Consent Act was properly foreclosed by the failure of Tennessee to implement and administer an adequate judicial bypass alternative to the parental consent requirement misconstrues the Court's opinion in *Bellotti*, and adds an "implementation and administration" component not discussed in *Bellotti* or any of the Court's other parental consent abortion decisions.

There is no question that the legislature of Tennessee did everything right. Tennessee's lawmakers enacted a parental consent law which contains an appropriate judicial bypass provision as dictated by this Court's precedent. In seeking to protect minors from their own immaturity, Tennessee requires a court order or parental permission for a minor to obtain an abortion. A Federal District Judge erroneously issued a preliminary injunction enjoining enforcement of the Act, which was later reversed on appeal.[1] The fundamental question

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[1] Respondent MAMCW repeatedly states in its Brief in Opposition that the Parental Consent Act was enjoined. (Resp. MAMCW Brief in Opposition pp. 1-2) Statutes cannot be enjoined since an injuction is a court order for a person to act or refrain from acting enforcable through courts' contempt powers. (See Pet. p. 10) MAMCW confuses a court's injunctive powers with declaratory relief.

before this Court is whether an erroneously issued preliminary injunction acts as a grant of blanket immunity for all persons (party or not) to ignore a duly enacted state statute, free forever from any risk of civil liability. What is the source of power for a federal judge to deny all potential litigants a civil cause of action because of an erroneously issued preliminary injunction against other parties?

What if a federal judge in one district in a state enjoined the governor, the attorney general and the administrative director of the courts from enforcing the state's statutory rape law, on the grounds that it unconstitutionally abridged a mature minor's right to privacy. After all, if a mature minor has a constitutional privacy right to terminate a pregnancy, some district judge could conceivably hold that a mature minor has a corollary privacy right to engage in intimate relations. If a District Judge erroneously preliminarily enjoined a state's statutory rape law, could adults throughout the state start having intercourse with 14 year old girls without fear of prosecution or civil liability? The ruling of the District Court and the Sixth Circuit in this case, if applied to the statutory rape law hypothetical, would lead to a result in which parents of 14 year old girls would be forever barred from seeking prosecution of (or civil damages from) the participating adult. The statutory rape law would not have been "in place" (Resp. MAMCW Brief in Opposition, pp. 8 & 24) during the pendency of the erroneously issued

injunction, because officers of the court throughout the state charged with enforcing the statutory rape law purportedly would have been bound by the injunction.

Respondents center their arguments on the proposition that this Court, by its opinion in *Bellotti v. Baird* 443 US 622 (1979), held that any state statute requiring parental consent before an abortion could be performed on a minor that did not also provide a working judicial bypass procedure would be unconstitutional. In *Bellotti*, this Court did not address whether the State of Massachussetts had actually implemented a judicial bypass procedure, it only considered whether the language of the statute itself was too restrictive, unconstitutionally burdening a minor's rights to an abortion. *Bellotti v. Baird*, 443 at, 647; *see also Lambert v. Wicklund*, 520 US 292, 295 (1997). In this case, Respondent's argue that since a federal preliminary injunction enjoined juvenile court advocates from assisting minors with obtaining a judicial bypass, that the preliminary injunction somehow rendered the Tennessee statute unconstitutional. Taking Respondent's argument to its logical conclusion, it would create a jurisprudence where the constitutionality of a statute would never be certain. After all, under the Respondents' view, if a court appointed advocate died suddenly, and thus there was no one to assist a minor in a particular county with obtaining an abortion on a particular day, the statute would be unconstitutional until a

person was hired to replace the deceased advocate. Likewise, if the telephone service was interrupted in a county due to a power failure, the Parental Consent Act would be unconstitutional during the period of the failure, since the hotline created to assist minors in obtaining abortions without parental consent would not be operable. How are civil courts supposed to determine whether a civil cause of action is available for the violation of the act if the constitutionality of such cause of action is subject to change on a daily basis? It would be strange to hold that the constitutionality of a statute fluctuated depending upon how effectively such statute was presently implemented and operating.

Nowhere does the *Bellotti* opinion (or any opinion discussing the constitutionality of a parental consent statute issued by this Court) address the issue presently before the Court, i.e., whether an admittedly constitutional statute can be eviscerated by an erroneously issued preliminary injunction, especially with respect to non-parties. Despite Respondents' contentions that the District Court decided the issue as a question of fact, the issue of whether the Tennessee Parental Consent Act provided Petitioners with a valid cause of action even during a period in which other parties were enjoined from implementing the Act is a question of law.

II. The District Court held that the Parental Consent Act creates a cause of action.

Respondent Manejwala contends in his Brief in Opposition that the Parental Consent Act does not create a new cause of action (Manejwala Resp Brief, p. 1). The District Court specifically found that the Parental Consent Act created a cause of action for interference with family relations:

> Additionally, the Court discerns an implication in §37-10-307 to create a civil cause of action for violation of the consent act...The Court therefore concludes that the Tennessee legislature intended to create a cause of action for interference with family affairs arising from violation of the Consent Act.

(R. 77, Order, p 8).

On appeal, the Sixth Circuit implicitly agreed with the District Court that the Parental Consent Act created a cause of action, since the entire discussion in the opinion concerns whether the civil aspects of the Parental Consent Act may be enforced in light of the *Planned Parenthood* injunction. If the Act did not create a civil cause of action, there would be no need to discuss whether the civil provisions of the Act were enjoined, since they would be of no effect. Because neither Respondent filed a cross-petition raising this

issue decided adversely to them below, and because the question as to whether the act creates a civil cause of action is not subsumed in any Question Presented framed by any party, it is not properly before the Court. *See* Supreme Court Rule 14.1(a).

III. Respondent's argument that the State of Tennessee represented the Petitioners' interests was rejected by both the District Court and the Court of Appeals, and is not properly before this Court.

Respondent Manejwala argues in his Brief in Opposition that the State of Tennessee represented the Blackards' interests when it defended Planned Parenthood's injunctive relief suit, thereby precluding subjecting Respondents to civil liability for violating the Act. (Resp. Manejwala Brief in Opposition, pp 10-12). This contention is belied by the order entered by the District Court, which specifically held that Tennessee did not represent the Blackard's interests:

> Defendants also contend that Tennessee represented the interests of Plaintiffs in the Middle District litigation and that binding them to the terms of the 1997 injunction works no disservice. ... Plaintiffs at bar, the Blackards are not similarly situated to Tennessee - they seek

> relief through a civil remedy and allege very personal injuries. Therefore, the order enjoining the actions of Tennessee cannot run against the Blackards, who act entirely separately from Tennessee....

(R. 66, Order pp. 6 - 8).

Respondent Manejwala also asserts that "[w]hen a state is party to litigation involving matters of general public interest, the state represents all citizens." (Resp. Manejwala Brief in Opposition p. 10) Manejwala's assumption that this case raises only matters of general public interest is wrong, however. Petitioners did not seek relief because Respondents performed an abortion in Tennessee and that this tangential act has caused some vague harm. On the contrary, Ashley Blackard seeks damages because an abortion was performed upon her without obtained valid consent and she and her parents seek further relief because of the effect this battery has had upon family relations. It would be an unconscionable result to find that Tennessee adequately represented the very personal and important interests of Petitioners and that they are precluded from presenting their own arguments and claims. The arguments and cases proffered by Respondent Manejwala on this point are therefore unpersuasive. Also, on appeal, the Sixth Circuit agreed with the District Court, holding the Blackards were not bound by

Judge Nixon's injunction (Pet. App. 17a). Respondents have not filed a cross petition raising this issue, decided adversely to them below. The issue is not fairly subsumed in the Questions Presented as framed by either Petitioners or Respondents, and is therefore not properly before the Court. *See* Supreme Court Rule 14.1(a).

CONCLUSION

For the reasons stated herein, Petitioners Michael Blackard, Sharon Blackard, and Ashley Blackard respectfully request that this Honorable Court grant the Petition for Writ of Certiorari.

Respectfully submitted,

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